

EXHIBIT A

AMENDED IN ASSEMBLY JUNE 26, 2003

AMENDED IN SENATE MAY 22, 2003

AMENDED IN SENATE MAY 6, 2003

AMENDED IN SENATE MARCH 17, 2003

SENATE BILL

No. 186

Introduced by Senator Murray
(Coauthor: Assembly Member Maldonado)

February 12, 2003

An act to ~~amend Section 17538.4 of, and to add Article 1.8~~ (commencing with Section 17529) to Chapter 1 of Part 3 of Division 7 of, the Business and Professions Code, relating to privacy.

LEGISLATIVE COUNSEL'S DIGEST

SB 186, as amended, Murray. Privacy: unsolicited e-mail advertising.

Existing law prohibits a person or entity conducting business in the state from e-mailing or causing to be e-mailed documents consisting of unsolicited advertising material for the lease, sale, rental, gift offer, or other disposition of any realty, goods, services, or extension of credit unless that person or entity establishes a toll-free telephone number or valid sender operated return e-mail address that a recipient may contact to notify the sender not to e-mail the recipient any further unsolicited documents. Existing law requires that notification of the toll-free telephone number, and a valid address that a recipient may write to, be included on these unsolicited e-mailed documents, and prohibits the e-mailing of these unsolicited advertising documents to a person who has requested not to receive any further unsolicited documents. Existing

SB 186

— 2 —

law requires certain unsolicited e-mail advertisements to contain a heading of “ADV:” or “ADV:ADLT.” A violation of the provisions governing advertising is a misdemeanor.

This bill would prohibit an advertiser located in California from using unsolicited commercial e-mail advertisements. The bill would prohibit an advertiser not located in California from using unsolicited commercial e-mail advertisements sent to a California e-mail address if the advertiser knows or should reasonably know that it is a California e-mail address. The bill would provide that if any part of these provisions or their application is held invalid, the invalidity would not affect the other provisions.

This bill would authorize the recipient of a commercial e-mail advertisement transmitted in violation of these prohibitions, *the electronic mail service provider*, or the Attorney General to bring an action to recover *actual damages and liquidated damages of \$1,000 per individual violation transmitted message or \$1,000,000 per incident, as defined, whichever is less, subject to reduction by a court for specified reasons. The bill would also provide for an award of attorney’s fees and costs.* The bill would provide that a cause of action in existence prior to its enactment would be governed by the law in effect at the time it arose. *The bill would enact other related provisions.*

Because a violation of the bill would be a crime, it would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: yes.

The people of the State of California do enact as follows:

- 1 SECTION 1. Article 1.8 (commencing with Section 17529)
- 2 is added to Chapter 1 of Part 3 of Division 7 of the Business and
- 3 Professions Code, to read:
- 4

1 Article 1.8. Restrictions On Unsolicited Commercial E-mail
2 Advertisers
3

4 17529. For the purpose of this article, the following
5 definitions apply:

6 (a) “Advertiser” means a person or entity that advertises
7 through the use of unsolicited commercial e-mail advertisements.

8 (b) “California electronic mail address” or “California e-mail
9 address” means any of the following:

10 (1) An e-mail address furnished by an electronic mail service
11 provider that sends bills for furnishing and maintaining that e-mail
12 address to a mailing address in this state.

13 (2) An e-mail address ordinarily accessed from a computer
14 located in this state.

15 (3) An e-mail address furnished to a resident of this state.

16 (c) “Commercial e-mail advertisement” means any electronic
17 mail message initiated for the purpose of advertising or promoting
18 the lease, sale, rental, gift offer, or other disposition of any
19 property, goods, services, or extension of credit.

20 (d) “Direct consent” means that the recipient has expressly
21 consented to receive the message, either in response to a clear and
22 conspicuous request for the consent or at the recipient’s own
23 initiative.

24 (e) “Domain name” means any alphanumeric designation that
25 is registered with or assigned by any domain name registrar as part
26 of an electronic address on the Internet.

27 (f) “Electronic mail” or “e-mail” means an electronic
28 message that is transmitted between two or more
29 telecommunications devices, computers, or electronic devices
30 capable of receiving electronic messages, whether or not the
31 message is converted to hard copy format after receipt or is viewed
32 upon transmission or stored for later retrieval. “Electronic mail”
33 or “e-mail” includes electronic messages that are transmitted
34 through a local, regional, or global computer network.

35 (g) “Electronic mail address” or “e-mail address” means a
36 destination, commonly expressed as a string of characters, to
37 which electronic mail can be sent or delivered. An “electronic mail
38 address” or “e-mail address” may include a user name or mailbox
39 and a reference to an Internet domain.

SB 186

— 4 —

1 (h) “Incident” means a single transmission of substantially
2 similar content.

3 (i) “Internet” has the meaning set forth in paragraph (6) of
4 subdivision (e) of Section 17538.

5 ~~(i)~~

6 (j) “Preexisting or current business relationship,” as used in
7 connection with the sending of a commercial e-mail
8 advertisement, means ~~either of the following:~~

9 ~~(1) That within the three-year period ending upon receipt of the~~
10 ~~advertisement, the recipient has made an inquiry, application,~~
11 ~~purchase, or transaction regarding products or services offered by~~
12 ~~the sender.~~

13 ~~(2) That the recipient has made an inquiry, application,~~
14 ~~purchase, or transaction regarding products or services offered by~~
15 ~~the sender and the sender maintains an electronic or written record~~
16 ~~of the transaction.~~

17 ~~(j) that the recipient has made an inquiry, application,~~
18 ~~purchase, or transaction regarding products or services offered by~~
19 ~~the sender.~~

20 (k) “Recipient” means the addressee of a commercial e-mail
21 advertisement. If an addressee of a commercial e-mail
22 advertisement has one or more e-mail addresses to which a
23 commercial e-mail advertisement is sent, the addressee shall be
24 deemed to be a separate recipient for each e-mail address to which
25 the advertisement is sent.

26 ~~(k)~~

27 (l) “Unsolicited commercial e-mail advertisement” means a
28 commercial e-mail advertisement sent to a recipient who meets
29 both of the following criteria:

30 (1) The recipient has not provided direct consent to receive the
31 commercial e-mail advertisement.

32 (2) The recipient does not have a preexisting or current
33 business relationship, as defined in subdivision ~~(i)~~ (j), with the
34 advertiser of the realty, goods, services, or extension of credit.

35 17529.1. (a) Notwithstanding any other provision of law, if
36 an advertiser is located in California, the advertiser shall not
37 advertise using an unsolicited commercial e-mail advertisement.

38 (b) Notwithstanding any other provision of law, an advertiser
39 that is not located in California shall not advertise using an
40 unsolicited commercial e-mail advertisement that is sent to a

1 California e-mail address if the advertiser knows or should
2 reasonably foresee that the e-mail address is a California e-mail
3 address.

4 (c) The provisions of this section are severable. If any provision
5 of this section or its application is held invalid, that invalidity shall
6 not affect any other provision or application that can be given
7 effect without the invalid provision or application.

8 17529.2. (a) In addition to any other remedies provided by
9 this article or by other provisions of law, a recipient of an
10 unsolicited commercial e-mail advertisement transmitted in
11 violation of Section 17529.1, *the electronic mail service provider,*
12 *or the Attorney General* may bring an action to recover ~~one~~
13 ~~thousand dollars (\$1,000) for each individual violation of that~~
14 ~~section.~~

15 ~~(b) In addition to any other remedies provided by this article or~~
16 ~~by other provisions of law, the Attorney General may bring an~~
17 ~~action against a person or entity in violation of Section 17529.1 to~~
18 ~~recover one thousand dollars (\$1,000) for each individual~~
19 ~~violation of that section.~~

20 ~~SEC. 2. Section 17538.4 of the Business and Professions~~
21 ~~Code is amended to read:~~

22 ~~17538.4. (a) A person or entity conducting business in this~~
23 ~~state shall not electronically mail (e-mail) or cause to be e-mailed~~
24 ~~documents containing unsolicited advertising material for the~~
25 ~~lease, sale, rental, gift offer, or other disposition of any realty,~~
26 ~~goods, services, or extension of credit unless that person or entity~~
27 ~~establishes a toll-free telephone number or valid sender-operated~~
28 ~~return e-mail address that the recipient of the unsolicited~~
29 ~~documents may call or e-mail to notify the sender not to e-mail any~~
30 ~~further unsolicited documents.~~

31 ~~(b) An unsolicited e-mailed document subject to this section~~
32 ~~shall include a statement informing the recipient of the toll-free~~
33 ~~telephone number that the recipient may call, or a valid return~~
34 ~~address to which the recipient may write or e-mail, as the case may~~
35 ~~be, notifying the sender not to e-mail the recipient any further~~
36 ~~unsolicited documents to the e-mail address, or addresses,~~
37 ~~specified by the recipient.~~

38 ~~The statement shall be the first text in the body of the message~~
39 ~~and shall be of the same size as the majority of the text of the~~
40 ~~message.~~

SB 186

— 6 —

~~(c) Upon notification by a recipient of his or her request not to receive any further unsolicited e-mailed documents, a person or entity conducting business in this state shall not e-mail or cause to be e-mailed any unsolicited documents to that recipient.~~

~~(d) This section shall apply when the unsolicited e-mailed documents are delivered to a California resident via an electronic mail service provider's service or equipment located in this state. For these purposes, "electronic mail service provider" means a business or organization qualified to do business in this state that provides individuals, corporations, or other entities the ability to send or receive electronic mail through equipment located in this state and that is an intermediary in sending or receiving electronic mail.~~

~~(e) As used in this section, "unsolicited e-mailed documents" means an e-mailed document or documents consisting of advertising material for the lease, sale, rental, gift offer, or other disposition of any realty, goods, services, or extension of credit that meet both of the following requirements:~~

~~(1) The documents are addressed to a recipient with whom the initiator does not have an existing business or personal relationship.~~

~~(2) The documents are not sent at the request of, or with the express consent of, the recipient.~~

~~(f) As used in this section, "e-mail" or "cause to be e-mailed" does not include or refer to the transmission of any documents by a telecommunications utility or Internet service provider to the extent that the telecommunications utility or Internet service provider merely carries that transmission over its network.~~

~~(g) In the case of e-mail that consists of unsolicited advertising material for the lease, sale, rental, gift offer, or other disposition of any realty, goods, services, or extension of credit, the subject line of each and every message shall include "ADV:" as the first four characters. If these messages contain information that consists of unsolicited advertising material for the lease, sale, rental, gift offer, or other disposition of any realty, goods, services, or extension of credit that may only be viewed, purchased, rented, leased, or held in possession by an individual 18 years of age and older, the subject line of each and every message shall include "ADV:ADLT" as the first eight characters.~~

~~(h) An employer who is the registered owner of more than one e-mail address may notify the person or entity conducting business in this state e-mailing or causing to be e-mailed documents consisting of unsolicited advertising material for the lease, sale, rental, gift offer, or other disposition of any realty, goods, services, or extension of credit of the desire to cease e-mailing on behalf of all of the employees who may use employer-provided and employer-controlled e-mail addresses.~~

~~(i) This section shall not apply to an advertiser subject to Article 1.8 (commencing with Section 17529) of this chapter.~~

~~(j) This section, or any part of this section, shall become inoperative on and after the date that federal law is enacted that prohibits or otherwise regulates the transmission of unsolicited advertising by electronic mail (e-mail).~~

~~SEC. 3.—, in addition to actual damages, liquidated damages of one thousand dollars (\$1,000) for each unsolicited commercial e-mail advertisement transmitted in violation of this article, or one million dollars (\$1,000,000) per incident, whichever is less. The recipient, electronic mail service provider, or Attorney General, if the prevailing party, may also recover attorney's fees and costs. However, there shall not be a cause of action against an electronic mail service provider that transmits the unsolicited commercial e-mail advertisement over its computer network.~~

~~(b) If the court finds that the defendant established and implemented, with due care, practices and procedures reasonably designed to effectively prevent unsolicited commercial e-mail advertisements that are in violation of this article, the court shall reduce the liquidated damages recoverable under subdivision (a) to one hundred dollars (\$100) for each unsolicited commercial e-mail advertisement, or one hundred thousand dollars (\$100,000) per incident, whichever is less.~~

~~(c) At the request of any party to an action brought pursuant to this article, the court, in its discretion, may conduct all legal proceedings in a manner as to protect the secrecy and security of the computer, computer network, computer data, computer program, and computer software involved in order to prevent possible reoccurrence of the same or similar act by another person and to protect the trade secrets of any party.~~

~~17229.3. Nothing in this article shall be construed to have any effect on the lawfulness or unlawfulness, under any other provision~~

SB 186

— 8 —

1 *of law, of the adoption, implementation, or enforcement by a*
2 *provider of Internet access service of a policy of declining to*
3 *transmit, route, relay, handle, or store certain types of electronic*
4 *mail messages.*

5 *SEC. 2.* A cause of action that is in existence before the
6 effective date of this act shall not be affected by this act, but shall
7 instead be governed by the law that was in effect at the time the
8 cause of action arose.

9 ~~SEC. 4.~~

10 *SEC. 3.* No reimbursement is required by this act pursuant to
11 Section 6 of Article XIII B of the California Constitution because
12 the only costs that may be incurred by a local agency or school
13 district will be incurred because this act creates a new crime or
14 infraction, eliminates a crime or infraction, or changes the penalty
15 for a crime or infraction, within the meaning of Section 17556 of
16 the Government Code, or changes the definition of a crime within
17 the meaning of Section 6 of Article XIII B of the California
18 Constitution.

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EXHIBIT B

SB 186
Page 1

Date of Hearing: June 26, 2003

ASSEMBLY COMMITTEE ON JUDICIARY
Ellen M. Corbett, Chair
SB 186 (Murray) - As Amended: June 26, 2003

SENATE VOTE : 24-12

SUBJECT : UNSOLICITED E-MAIL ADVERTISING: SPAM

KEY ISSUES :

- 1) SHOULD CALIFORNIA BUSINESSES BE PROHIBITED FROM ADVERTISING TO IN-STATE OR OUT-OF-STATE CONSUMERS USING UNSOLICITED COMMERCIAL E-MAIL ADVERTISEMENTS?
- 2) SHOULD BOTH IN-STATE AND OUT-OF-STATE BUSINESSES BE PROHIBITED FROM ADVERTISING TO CALIFORNIA CONSUMERS USING UNSOLICITED COMMERCIAL E-MAIL ADVERTISEMENTS?
- 3) HOW BROADLY SHOULD THE PROHIBITION ON UNSOLICITED E-MAIL ADVERTISEMENTS APPLY?
- 4) SHOULD THERE BE A CAP ON THE LIQUIDATED DAMAGES AVAILABLE FOR VIOLATIONS OF THE PROPOSED PROHIBITION ON UNSOLICITED E-MAIL ADVERTISEMENTS?

SYNOPSIS

This bill is intended to address a problem familiar to all computer users: unsolicited e-mail advertisements, commonly known as spam. The bill prohibits all unsolicited commercial e-mail advertisements, as defined, from California businesses or to California e-mail addresses, except that as to advertisements to consumers who have expressly consented to receive the message, or to consumers who have had any previous relationship with the advertiser, are not prohibited. The bill permits a consumer, an e-mail service provider, or the Attorney General to bring suit based on a violation of the prohibition, and to seek liquidated damages of one thousand dollars for each advertisement sent in violation of the prohibition, up to one million dollars per incident (defined as a single transmission), with lower liquidated damages where the defendant followed certain practices.

SB 186
Page 2

SB 186 is similar to another bill currently pending in the

Assembly Business and Professions Committee, SB 12 (Bowen), which is referred to this Committee after Business and Professions. The prohibitions in SB 186 apply more narrowly than those in SB 12. For example, SB 186 applies only to advertisers, the businesses whose products are advertised in unsolicited commercial e-mail advertisements. SB 12 applies more broadly to prohibit anyone from sending such an advertisement - creating liability on the part of a sender who sends such e-mail advertising another entity's products or services. SB 186 only bars advertisements by out-of-state senders if the sender knew or should have reasonably foreseen that the ad was being sent to a California e-mail address; SB 12 prohibits the sending of an unsolicited ad to a California e-mail address whether or not the sender knew it was a California e-mail address. In addition, SB 12 does not cap the total amount recoverable per incident but allows recovery based on the number of advertisements transmitted.

The analysis suggests an amendment to clarify that there may be a cause of action against an e-mail service provider if the provider is the sender of unsolicited commercial e-mail advertisements and other amendments to clarify some of the definitions used in the bill.

Because this bill is scheduled to be heard by the Business and Professions Committee on July 1, any amendments taken will be formally adopted in that committee, pursuant to an agreement.

SUMMARY : Creates new restrictions on unsolicited e-mail advertisements. Specifically, this bill :

1) Defines various terms used in the bill, including the following:

- i) "Advertiser" means a person or entity that advertises through the use of unsolicited e-mail advertisements.
- ii) "California electronic mail address" or "California e-mail address" means an e-mail address furnished by an electronic mail service provider that sends bills for furnishing and maintaining that e-mail address to a mailing address in this state, or an e-mail address ordinarily accessed from a computer in this state, or an e-mail address furnished to a

SB 186
Page 3

resident of this state.

- iii) "Commercial e-mail advertisement" means any electronic mail message initiated for the purpose of advertising or promoting the lease, sale, rental, gift offer, or other disposition of any property, goods, services, or extension of credit.
- iv) "Incident" means a single transmission of substantially similar content.

- v) "Preexisting or current business relationship" as used in connection with the sending of a commercial e-mail advertisement means that the recipient has made an inquiry, application, purchase, or transaction regarding products or services offered by the sender.
- vi) "Unsolicited commercial e-mail advertisement" means a commercial e-mail advertisement sent to a recipient who has not provided direct consent to receive the commercial e-mail advertisement and who does not have a preexisting or current business relationship with the advertiser of the realty, goods, services, or extension of credit.
- 2) Prohibits an advertiser located in California from advertising using an unsolicited commercial e-mail advertisement.
- 3) Prohibits an advertiser that is not located within California from advertising using an unsolicited commercial e-mail advertisement that is sent to a California e-mail address if the advertiser knows or should reasonably foresee that the e-mail address is a California e-mail address.
- 4) Provides that the provisions of the section barring unsolicited commercial e-mail advertisements are severable.
- 5) Provides that in addition to any other remedies provided by the newly created provisions or any other provisions of law, the recipient of an unsolicited commercial e-mail advertisement transmitted in violation of the provisions described above, an e-mail service provider, or the Attorney General (AG) may bring an action to recover, in addition to actual damages, liquidated damages of one thousand dollars for each unsolicited commercial e-mail advertisement transmitted in violation of the newly created provisions, or one million

SB 186
Page 4

dollars per incident, whichever is less, and may also recover attorney's fees and costs.

- 6) States that there is no cause of action under (5), above, against an electronic mail service provider that transmits the unsolicited commercial e-mail advertisement over its computer network.
- 7) Provides that if the court finds that the defendant established and implemented, with due care, practices and procedures designed to effectively prevent unsolicited commercial e-mail advertisements in violation of the newly created provisions, the court shall reduce the liquidated damages recoverable to one hundred dollars for each unsolicited e-mail advertisement or one hundred thousand dollars per incident, whichever is less.
- 8) Permits the court, at the request of any party to an action brought pursuant to the newly created article, to conduct all

legal proceedings in a manner as to protect the secrecy and security of the computer, computer network, data, program and software involved in order to prevent possible reoccurrence of the same or a similar act and to protect the trade secrets of any party.

9) Provides that nothing in the newly created article shall be construed to have any effect on the lawfulness or unlawfulness under any other provision of law of the adoption, implementation, or enforcement by a provider of Internet access service of a policy of declining to transmit, route, relay, handle, or store certain types of electronic mail messages.

10) States that a cause of action that is in existence before the effective date of the bill shall not be affected by it but shall be governed by the law in effect at the time the cause of action arose.

EXISTING LAW :

1) Prohibits unsolicited advertising by e-mail unless that e-mail contains either a toll free phone number or return e-mail address which the recipient can use to notify the sender not to electronically send any further unsolicited ads. (Business and Professions Code section 17538.4 (b)). All further

SB 186
Page 5

references are to the Business and Professions Code unless otherwise noted.)

2) Prohibits sending unsolicited e-mail ads to any recipient who has notified the sender to stop sending unsolicited e-mails. (Section 17538.4 (c).)

3) Requires unsolicited e-mail ads to contain a heading of "ADV:" or "ADV:ADLT," as specified. (Section 17538.4 (g).)

4) Prohibits the unauthorized use of e-mail networks to send unsolicited e-mail ads and authorizes any e-mail service provider whose policy on unsolicited e-mail ads is violated to bring a civil action to recover the actual monetary loss suffered by that provider by reason of that violation, or liquidated damages of \$50 for each e-mail message initiated or delivered, up to a maximum of \$25,000 per day, whichever amount is greater. (Section 17538.45.)

FISCAL EFFECT : The bill as currently in print is keyed fiscal.

COMMENTS : This bill is intended to address a problem well known to all e-mail users: the proliferation of unsolicited e-mail advertisements, or spam. The author states:

This bill will get at the real solution to unsolicited e-mails by allowing people to sue the advertisers of unsolicited e-mails. SB 186 seeks to get to the heart of

the matter by penalizing the actual advertiser of the spam e-mails. ? We need to go after the companies that are profiting by these e-mails and allow recipients to hold the advertisers financially responsible.

SB 186 prohibits a California advertiser from sending unsolicited e-mail advertisements, and prohibits any advertiser from sending unsolicited commercial e-mail advertisements to a California e-mail address, as defined, if the advertiser knows or should reasonably foresee that the e-mail address is a California e-mail address. The bill creates a cause of action for the consumer, the e-mail service provider, or the AG, to sue for violation of the prohibition. In addition to actual damages (likely to be small in many such suits) the bill permits the plaintiff to seek liquidated damages of one thousand dollars per advertisement, up to one million dollars per incident, defined as a single transmission of substantially similar content. Thus

SB 186

Page 6

the liquidated damages in a case involving transmission of a single advertisement to many thousands of consumers would be capped at one million dollars. Where a defendant could show that it implemented practices designed to effectively prevent unsolicited commercial e-mail advertisements, the liquidated damages available would be one hundred dollars per advertisement, capped at one hundred thousand dollars per incident.

Comparison with SB 12 : SB 186 is similar to some of the provisions contained in SB 12 (Bowen), currently pending in the Assembly Business and Professions Committee. (In addition to the provisions paralleling those of SB 186, SB 12 contains other provisions beyond the scope of SB 186. Those provisions address, among other things, e-mail advertisements with misleading or falsified header information, e-mail advertisements that contain a third party's domain name used without permission, and the collection of or automatic generation of e-mail addresses in order to send unsolicited commercial e-mail advertisements.) SB 186 is narrower than SB 12 as to what is prohibited, in several ways.

What action is prohibited ? SB 186 prohibits advertisers - the entities whose products or services are advertised in the e-mail - from advertising using unsolicited commercial e-mail advertisements. SB 12 instead prohibits any entity from initiating the transmission of an unsolicited commercial e-mail advertisement, as specified. Thus under SB 186, there would be no cause of action against a sender of spam who sent it on behalf of another company (e.g. Fax.com); only the company advertising in the spam would be liable. Under SB 12, the sender or the advertiser or both could be sued. The committee may wish to discuss with the author amending the bill to prohibit unsolicited advertisements from both senders and advertisers.

What constitutes an unsolicited commercial e-mail advertisement ?

Both SB 12 and SB 186 exclude from the definition of an unsolicited e-mail advertisement a message that is sent with the direct consent of the recipient, or where the recipient has a preexisting business relationship with the sender. Direct consent has the same definition in both bills: it means that the recipient has expressly consented to receive the message, either in response to a clear and conspicuous request for the consent or at the recipient's own initiative.

SB 186

Page 7

SB 12, however, uses a narrower definition of "preexisting business relationship" than does SB 186, thus more strictly limiting the circumstances under which a company may send an unsolicited e-mail to someone. Under SB 12, "preexisting business relationship" is defined to mean either of the following: that within the three years ending upon receipt of the advertisement, the recipient has made an inquiry, application, purchase or transaction regarding products or services offered by the sender, or, that the recipient has made an inquiry, application, purchase, or transaction regarding products or services offered by the sender, and the sender maintains a written or electronic record of the inquiry, application, purchase or transaction.

Under SB 186, there is no time requirement or requirement that a record be kept of the inquiry, application, purchase or transaction. Proponents of the bill argue that this approach protects legitimate businesses who wish to be able to contact their customers without facing burdensome record-keeping requirements. However, this does create a large exception to the prohibition on unsolicited e-mails under SB 186: a business that has been contacted once by a consumer with an inquiry would be able to send that consumer unsolicited e-mail advertisements forever. Moreover, a business sued under the provisions of SB 186 for sending unsolicited e-mails might argue that the e-mails were sent to consumers with whom the business had a preexisting relationship, but that the business had not kept records of the previous contact. Such a defense might be difficult to counter.

Requirement of knowledge that the recipient has a California e-mail address . SB 186 prohibits an advertiser located outside of California from sending an unsolicited commercial e-mail if the advertiser knows or should reasonably foresee that the e-mail address is a California e-mail address. SB 12, by contrast, prohibits the initiation of any unsolicited commercial e-mail advertisement to a California e-mail address - whether or not the sender had some reason to know that the address was in California.

The requirement under SB 186 that the sender must know or should reasonably foresee that the recipient has a California e-mail address is likely to leave many senders of spam beyond the reach of the proposed law. An out-of-state company with a list of e-mail addresses in most cases would have no way to know which

of the addresses are California e-mail addresses, as defined. Therefore, it would be difficult for Californians to sue such companies - leaving Californians open to a world of spam from out of state. The committee may wish to discuss with the author amending the bill to delete the requirement that the advertiser knew or should reasonably have foreseen that it was transmitting to a California e-mail address.

Damages for violations . Both SB 186 and SB 12 create new remedies for violations of their prohibitions, in addition to other remedies available under law. Under SB 12, a recipient of an unsolicited commercial e-mail advertisement would be able to recover actual damages or \$500 for each individual violation, whichever is greater, and reasonable costs and attorney's fees. The court could triple the amount to be recovered where it found that the violation was willful or knowing. In addition, a civil penalty of \$250 would be imposed for each individual violation with the money going to the High Technology Theft Apprehension and Prosecution Program Trust Fund.

Under SB 186, \$1000 in liquidated damages, in addition to actual damages, would be available for each unsolicited commercial e-mail advertisement transmitted in violation of the bill's prohibitions. SB 186 creates a cap of one million dollars per incident, defined as a single transmission of substantially similar content. Thus where an unsolicited e-mail ad went out to a million recipients, only one million dollars in liquidated damages would be available. (See Author's Amendments, below, regarding clarification of this definition.) Where a court finds that the defendant implemented practices reasonably designed to effectively prevent the transmission of unsolicited e-mail ads, the liquidated damages would be \$100 per advertisement with a cap of \$100,000 per incident. SB 12, by contrast, would make implementation of such practices an affirmative defense.

SB 186 permits the recipient, the e-mail service provider, or the AG to bring suit.

Protection for trade secrets . SB 186 contains a provision permitting the court to conduct legal proceedings in a manner so as to protect the secrecy and security of specified information relating to the computer systems involved, to prevent a reoccurrence of the violation and to protect the trade secrets of any party. It is unclear why this provision is necessary.

Existing law provides procedures for a court to protect sensitive information that may be revealed in the course of litigation. (See , e.g. , Code of Civil Procedure section 2031 (f), permitting a court to craft a protective order regarding information obtained through discovery.) Creating a new provision for secrecy in one specific type of case puts at risk the general rule in California law that court proceedings are public, and denies the public information about this type of case. The committee may wish to discuss with the author the potential benefits of amending the bill to delete this paragraph.

Author's Technical Amendments . The author has agreed to take two technical amendments in the Business and Professions Committee to clarify the provisions of the bill and to better focus some of its provisions, as follows:

1. Where the bill states that the recipient, e-mail service provider, or AG, if the prevailing party, may recover attorney's fees and costs, the author has agreed to amend the bill to permit instead an award of attorney's fees and costs to a prevailing plaintiff.
2. Where the bill currently states that there shall not be a cause of action against an electronic mail service provider that transmits the unsolicited ad over its network, the author has agreed to amend this instead to provide that there is no cause of action under the bill against an electronic mail service provider only involved in the routine transmission of the advertisement. The bill will define routine transmission as "the transmission, routing, relaying, handling, or storing of an electronic mail message through an automatic technical process."

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REGISTERED SUPPORT / OPPOSITION :

Support

Microsoft Corporation

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Opposition

None on file

SB 186

Page 10

Analysis Prepared by : Kathy Sher / JUD. / (916) 319-2334

EXHIBIT C

AMENDED IN ASSEMBLY JUNE 26, 2003

AMENDED IN ASSEMBLY JUNE 10, 2003

AMENDED IN SENATE MAY 13, 2003

AMENDED IN SENATE MARCH 18, 2003

SENATE BILL

No. 12

Introduced by Senator Bowen

**(Coauthors: Senators Ducheny, Kuehl, Machado, Ortiz, Perata,
Romero, Scott, Soto, Torlakson, and Vasconcellos)**

**(Coauthors: Assembly Members Chan, Hancock, Jackson, Leno,
Leslie, Longville, Nation, Pavley, Vargas, Wolk, and Yee)**

December 2, 2002

An act to amend Section 17538.45 of, to add Article 1.8 (commencing with Section 17529) to Chapter 1 of Part 3 of Division 7 of, and to repeal Section 17538.4 of, the Business and Professions Code, relating to advertising.

LEGISLATIVE COUNSEL'S DIGEST

SB 12, as amended, Bowen. Electronic mail advertising.

Existing law prohibits a person or entity conducting business in the state from e-mailing or causing to be e-mailed documents consisting of unsolicited advertising material for the lease, sale, rental, gift offer, or other disposition of any realty, goods, services, or extension of credit unless that person or entity establishes a toll-free telephone number or valid sender operated return e-mail address that a recipient may contact to notify the sender not to e-mail the recipient any further unsolicited documents. Existing law requires that notification of the toll-free telephone number, and a valid address that a recipient may write to, be

included on all unsolicited e-mailed documents, as specified, and prohibits the e-mailing of any unsolicited documents to a person who has requested not to receive any further unsolicited documents. Existing law requires unsolicited e-mail advertisements to contain a heading of “ADV:” or “ADV:ADLT,” as specified.

This bill would delete these provisions and would instead prohibit a person or entity from initiating an unsolicited commercial e-mail advertisement either from California or to a California electronic mail address. The bill would also make it unlawful for a person or entity to collect or use electronic mail addresses or to ~~establish~~ *register for* multiple electronic mail accounts for the purpose of initiating the transmission of unsolicited commercial e-mail advertisements from California or to a California e-mail address.

This bill would prohibit a person from initiating transmission of a commercial e-mail advertisement either from California or to a California e-mail address where the advertisement (1) contains or is accompanied by a 3rd party’s domain name without permission, (2) contains or is accompanied by falsified, misrepresented, obscured, or forged header information, or (3) has a misleading subject line.

This bill would authorize the recipient of a commercial e-mail advertisement transmitted in violation of any of these provisions *or the electronic mail service provider* to bring an action to recover the greater of actual damages or \$500 per individual violation, *up to a maximum amount of \$50,000 per day*, and reasonable costs and attorney’s fees. The bill would also impose a civil penalty of \$250 for each individual violation, to be paid to the High Technology Theft Apprehension and Prosecution Program Trust Fund. The bill would authorize the court to increase the award to up to triple this amount if the violation was willful or knowing. The bill would provide that any cause of action in existence prior to its enactment would not be affected by the act and would be governed by the law in effect at the time it arose.

Existing law prohibits a registered user of an electronic mail service provider, as defined, from using or causing to be used the provider’s equipment located in this state in violation of the provider’s policy prohibiting or restricting the use of its equipment for the initiation of unsolicited electronic mail advertisements. Existing law prohibits an individual, corporation, or other entity from using or causing to be used, by initiating an unsolicited electronic mail advertisement, an electronic mail service provider’s equipment located in this state in violation of the provider’s policy prohibiting or restricting the use of its equipment to

deliver unsolicited electronic mail advertisements to its registered users. Existing law authorizes an electronic mail service provider whose policy is violated to bring a civil action to recover specified damages, but requires the provider to establish as an element of the cause of action that the defendant had actual notice, prior to the violation, of the provider's policy and that the advertisements would use or cause to be used the provider's equipment located in this state.

This bill would delete the above prohibitions and instead prohibit a person who has been given notice by an e-mail service provider of its policies regarding unsolicited commercial e-mail advertisements from using a computer, computer network, or the computer services of the provider to initiate the transmission of an unsolicited commercial e-mail advertisement from California or to a California e-mail address in violation of those policies. The bill would ~~also~~ delete the requirement that a provider bringing an action for a violation of its policies establish that the defendant had actual notice, prior to the violation, of the provider's policies and that the advertisements would use, or cause to be used, the provider's equipment located in this state. *The bill would authorize an electronic mail service provider whose policy is violated to recover in a civil action \$500 for each violation up to a maximum of \$200,000 per day.*

A violation of the provisions governing advertising is a misdemeanor. Because a violation of the provisions of this bill would be a crime, the bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: yes.

The people of the State of California do enact as follows:

- 1 SECTION 1. Article 1.8 (commencing with Section 17529)
- 2 is added to Chapter 1 of Part 3 of Division 7 of the Business and
- 3 Professions Code, to read:
- 4

SB 12

— 4 —

1 Article 1.8. Restrictions on Unsolicited Commercial E-Mail
2 Advertisement

3
4 17529. For the purpose of this title, the following definitions
5 apply:

6 (a) “California electronic mail address” means any of the
7 following:

8 (1) An electronic mail address furnished by an electronic mail
9 service provider that sends bills for furnishing and maintaining
10 that electronic mail address to a mailing address in this state.

11 (2) An electronic mail address ordinarily accessed from a
12 computer located in this state.

13 (3) An electronic mail address furnished to a resident of this
14 state.

15 (b) “Commercial e-mail advertisement” means any electronic
16 mail message initiated for the purpose of advertising or promoting
17 the lease, sale, rental, gift offer, or other disposition of any
18 property, goods, services, or extension of credit.

19 (c) “Direct consent” means that the recipient has expressly
20 consented to receive the message, either in response to a clear and
21 conspicuous request for the consent or at the recipient’s own
22 initiative.

23 (d) “Domain name” means any alphanumeric designation that
24 is registered with or assigned by any domain name registrar as part
25 of an electronic address on the Internet.

26 (e) “Electronic mail” or “e-mail” means an electronic
27 message that is sent to an electronic mail address and transmitted
28 between two or more telecommunications devices, computers, or
29 electronic devices capable of receiving electronic messages,
30 whether or not the message is converted to hard copy format after
31 receipt or is viewed upon transmission or stored for later retrieval.
32 “Electronic mail” or “e-mail” includes electronic messages that
33 are transmitted through a local, regional, or global computer
34 network.

35 (f) “Electronic mail address” means a destination, commonly
36 expressed as a string of characters, to which electronic mail can be
37 sent or delivered. An “electronic mail address” consists of a user
38 name or mailbox and a reference to an Internet domain.

39 (g) “Electronic mail service provider” means any person,
40 including an Internet service provider, that is an intermediary in

1 sending or receiving electronic mail or that provides to end users
2 of the electronic mail service the ability to send or receive
3 electronic mail.

4 (h) “Header information” means the source, destination, and
5 routing information attached to an electronic mail message,
6 including the originating domain name and originating electronic
7 mail address.

8 (i) “Initiate the transmission of a commercial e-mail
9 advertisement” means to transmit or cause to be transmitted a
10 commercial e-mail advertisement or assist in the transmission of
11 a commercial e-mail advertisement by providing electronic mail
12 addresses to which the advertisement may be sent, but does not
13 include the routine transmission of the advertisement through the
14 network or system of a telecommunications utility or an electronic
15 mail service provider through its network or system.

16 (j) “Internet” has the meaning set forth in paragraph (6) of
17 subdivision (f) of Section 17538.

18 (k) “Preexisting or current business relationship,” as used in
19 connection with the sending of a commercial e-mail
20 advertisement, means ~~either of the following:~~

21 ~~(1) That within the three-year period ending upon receipt of the~~
22 ~~advertisement, the recipient has made an inquiry, application,~~
23 ~~purchase, or transaction regarding products or services, including~~
24 ~~the use of free products or services, offered by the sender.~~

25 ~~(2) That the recipient has made an inquiry, application,~~
26 ~~purchase, or transaction regarding products or services offered by~~
27 ~~the sender and the sender maintains an electronic or written record~~
28 ~~of the inquiry, application, purchase, or transaction.~~

29 (l) “Recipient” means the authorized user of the electronic
30 mail address to which the message was sent or delivered. If a
31 recipient of a commercial e-mail advertisement has one or more
32 electronic mail addresses to which a commercial e-mail
33 advertisement is sent, the recipient shall be deemed to be a separate
34 recipient for each address to which the advertisement is sent.

35 (m) “Routine transmission” means the transmission, routing,
36 relaying, handling, or storing of an electronic mail message
37 through an automatic technical process.

38 (n) “Sender” means a person or entity who initiates the
39 transmission of a commercial e-mail advertisement or whose
40 product, service, or Internet Web site is advertised or promoted by

SB 12

— 6 —

1 the message. A sender does not include a person or entity whose
2 product, service, or Internet Web site is contained in, or
3 accompanied by, a commercial e-mail advertisement initiated by
4 a third party where the third party has not obtained authorization
5 from the person or entity to advertise the person or entity's
6 product, service, or Internet Web site.

7 (o) "Unsolicited commercial e-mail advertisement" means a
8 commercial e-mail advertisement sent to a recipient who meets
9 both of the following criteria:

10 (1) The recipient has not provided direct consent to receive the
11 commercial e-mail advertisement.

12 (2) The recipient does not have a preexisting or current
13 business relationship with the sender or offeror of the property,
14 goods, or services.

15 If a recipient has either provided direct consent or has a
16 preexisting or current business relationship with the sender,
17 commercial e-mail advertisements from that sender shall not be
18 construed as unsolicited commercial e-mail advertisements.

19 17529.1. Notwithstanding any other provision of law, no
20 person or entity may do either of the following:

21 (a) Initiate an unsolicited commercial e-mail advertisement
22 from California.

23 (b) Initiate an unsolicited commercial e-mail advertisement to
24 a California electronic mail address.

25 17529.2. (a) It is unlawful for any person or entity to initiate
26 the transmission of a commercial e-mail advertisement either from
27 California or to a California electronic mail address under any of
28 the following circumstances:

29 (1) The commercial e-mail advertisement contains or is
30 accompanied by a third party's domain name without permission
31 of the third party.

32 (2) The commercial e-mail advertisement contains or is
33 accompanied by falsified, misrepresented, obscured, or forged
34 header information.

35 (3) The commercial e-mail advertisement has a subject line that
36 has the capacity or tendency to mislead the public about the
37 contents of the advertisement.

38 (b) It is not a violation of paragraph (1) or (2) of subdivision (a)
39 to use a third party's domain name if the third party has given
40 permission for its use by the user.

1 17529.3. (a) It is unlawful for any person or entity to collect
 2 electronic mail addresses posted on the Internet if the purpose is
 3 for the electronic mail addresses to be used by a sender to do either
 4 of the following:

5 (1) Initiate the transmission of unsolicited commercial e-mail
 6 advertisements from California.

7 (2) Initiate the transmission of unsolicited commercial e-mail
 8 advertisements to a California electronic mail address.

9 (b) It is unlawful for any person or entity to sell or otherwise
 10 provide a list of electronic mail addresses to be used by a sender
 11 to do either of the following:

12 (1) Initiate the transmission of unsolicited commercial e-mail
 13 advertisements from California.

14 (2) Initiate the transmission of unsolicited commercial e-mail
 15 advertisements to a California electronic mail address.

16 (c) It is unlawful for any person to use an electronic mail
 17 address obtained by using automated means based on a
 18 combination of names, letters, or numbers to do either of the
 19 following:

20 (1) Initiate the transmission of unsolicited commercial e-mail
 21 advertisements from California.

22 (2) Initiate the transmission of unsolicited commercial e-mail
 23 advertisements to a California electronic mail address.

24 (d) It is unlawful for any person to use scripts or other
 25 automated means to ~~establish~~ *register for* multiple electronic mail
 26 accounts from which to do, or to enable another person to do, either
 27 of the following:

28 (1) Initiate the transmission of unsolicited commercial e-mail
 29 advertisements from California.

30 (2) Initiate the transmission of unsolicited commercial e-mail
 31 advertisements to a California electronic mail address.

32 17529.4. (a) *(1)* In addition to any other remedies provided
 33 by this article or by other provisions of law, a recipient of a
 34 commercial e-mail advertisement transmitted in violation of
 35 Section 17529.1, 17529.2, or 17529.3, *or an electronic mail*
 36 *service provider through whose system a commercial e-mail*
 37 *advertisement is transmitted in violation of Section 17529.1,*
 38 *17529.2, or 17529.3,* may bring an action to recover either actual
 39 damages or five hundred dollars (\$500) for each individual
 40 violation, whichever is greater, *up to a maximum of two hundred*

SB 12

— 8 —

1 *thousand dollars (\$200,000) per day per recipient or electronic*
 2 *mail service provider; and may also recover reasonable costs and*
 3 *attorney's fees.*

4 ~~(b)~~

5 (2) If the court finds that the violation was willful or knowing,
 6 the court may, in its discretion, increase the amount of the award
 7 to an amount equal to not more than three times the amount
 8 available under ~~subdivision (a)~~ *paragraph (1)*.

9 ~~(c)~~

10 (b) In addition to the award set forth in subdivisions (a) and (b),
 11 a civil penalty of two hundred fifty dollars (\$250) shall be imposed
 12 for each individual violation, to be paid to the High Technology
 13 Theft Apprehension and Prosecution Program Trust Fund, which
 14 may be expended by the Office of Criminal Justice Planning to
 15 fund programs to enhance the capacity of local law enforcement
 16 and prosecutors to deter, investigate, and prosecute high
 17 technology related crimes.

18 ~~(d)~~

19 (c) A person or entity shall not be found to have violated this
 20 article if, in attempting to comply with this article, the person or
 21 entity relies on information provided by a recipient, or prospective
 22 recipient, who has expressly disclosed that he or she is not a
 23 California resident.

24 ~~(e)~~

25 (d) It shall be an affirmative defense in any action brought
 26 under this article that the defendant has established and
 27 implemented, with due care, reasonable practices and procedures
 28 to effectively prevent violations of this article.

29 ~~(f)~~

30 (e) No person or entity shall have a cause of action against an
 31 electronic mail service provider only involved in the routine
 32 transmission of the commercial e-mail advertisement or
 33 unsolicited commercial e-mail advertisement sent in violation of
 34 this article.

35 17529.9. The remedies provided for in this article are in
 36 addition to, and not in lieu of, any other remedies provided for by
 37 law.

38 SEC. 2. Section 17538.4 of the Business and Professions
 39 Code is repealed.

1 SEC. 3. Section 17538.45 of the Business and Professions
2 Code is amended to read:

3 17538.45. (a) The definitions set forth in Section 17529
4 apply to this section.

5 (b) No person shall use a computer, computer network, or the
6 computer services of an electronic service provider to initiate the
7 transmission of an unsolicited commercial e-mail advertisement
8 from California or to a California electronic mail address in
9 violation of the policies established by an electronic mail service
10 provider if the electronic mail service provider has provided the
11 person with notice of those policies. For the purpose of this
12 subdivision, notice of the electronic mail service provider's
13 policies regarding the transmission of unsolicited commercial
14 e-mail advertisements shall be deemed sufficient if the electronic
15 mail service provider maintains an accessible Web page setting
16 forth those policies and provides notice via electronic means
17 between the sending and receiving computers.

18 (c) An electronic mail service provider shall not be required to
19 create a policy prohibiting or restricting the use of its equipment
20 for the initiation or delivery of unsolicited commercial e-mail
21 advertisements.

22 (d) Nothing in this section shall be construed to limit or restrict
23 the rights of an electronic mail service provider under Section
24 230(c)(1) of Title 47 of the United States Code, or any decision of
25 an electronic mail service provider to permit or to restrict access
26 to or use of its system, or any exercise of its editorial function.

27 (e) (1) In addition to another action available under law, any
28 electronic mail service provider whose policy on unsolicited
29 electronic mail advertisements is violated as provided in this
30 section may bring a civil action to recover the actual monetary loss
31 suffered by that provider by reason of that violation, or liquidated
32 damages of ~~fifty dollars (\$50)~~ *five hundred dollars (\$500)* for each
33 electronic mail message initiated or delivered in violation of this
34 section, whichever amount is greater, up to a maximum of
35 ~~twenty-five thousand dollars (\$25,000) per day.~~

36 ~~(2) two hundred thousand dollars (\$200,000) per day per~~
37 *electronic mail service provider.*

38 (2) *If the court finds that the violation was willful or knowing,*
39 *the court may, in its discretion, increase the amount of the award*

SB 12

— 10 —

1 *to an amount equal to not more than three times the amount*
 2 *available under paragraph (1).*

3 (3) In any action brought pursuant to paragraph (1), the court
 4 may award reasonable attorney's fees to a prevailing party.

5 ~~(3)~~

6 (4) A violation of this section shall not be subject to Section
 7 17534.

8 SEC. 4. Any cause of action that is in existence before the
 9 effective date of this act shall not be affected by this act, but shall
 10 instead be governed by the law that was in effect at the time the
 11 cause of action arose.

12 SEC. 5. No reimbursement is required by this act pursuant to
 13 Section 6 of Article XIII B of the California Constitution because
 14 the only costs that may be incurred by a local agency or school
 15 district will be incurred because this act creates a new crime or
 16 infraction, eliminates a crime or infraction, or changes the penalty
 17 for a crime or infraction, within the meaning of Section 17556 of
 18 the Government Code, or changes the definition of a crime within
 19 the meaning of Section 6 of Article XIII B of the California
 20 Constitution.

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EXHIBIT D

COMPLETE BILL HISTORY

BILL NUMBER : S.B. No. 12
AUTHOR : Bowen
TOPIC : Electronic mail advertising.

TYPE OF BILL :

Active
Non-Urgency
Non-Appropriations
Majority Vote Required
Non-State-Mandated Local Program
Fiscal
Non-Tax Levy

BILL HISTORY

2004

Nov. 30 From Assembly without further action.
Nov. 30 From committee without further action.
Apr. 12 From committee with author's amendments. Read second time.
Amended. Re-referred to committee.

2003

July 9 Hearing postponed by committee.
July 1 Set, second hearing. Failed passage in committee. Reconsideration granted.
June 26 From committee with author's amendments. Read second time.
Amended. Re-referred to committee.
June 17 Set, first hearing. Held in committee and under submission.
June 10 From committee with author's amendments. Read second time.
Amended. Re-referred to committee.
June 5 To Coms. on B. & P. and JUD.
May 22 In Assembly. Read first time. Held at Desk.
May 22 Read third time. Passed. (Ayes 21. Noes 12. Page 1039.) To Assembly.
May 20 Read second time. To third reading.
May 19 From committee: Be placed on second reading file pursuant to Senate Rule 28.8.
May 13 From committee with author's amendments. Read second time.
Amended. Re-referred to committee.
May 8 Set for hearing May 19.
Apr. 1 Set, first hearing. Hearing canceled at the request of author.
Mar. 27 Set for hearing April 7.
Mar. 26 From committee: Do pass, but first be re-referred to Com. on APPR. (Ayes 5. Noes 1. Page 361.) Re-referred to Com. on APPR.
Mar. 18 From committee with author's amendments. Read second time.
Amended. Re-referred to committee.
Mar. 13 Set for hearing March 24.
Jan. 8 To Com. on B. & P.

2002

Dec. 3 From print. May be acted upon on or after January 2.
Dec. 2 Introduced. Read first time. To Com. on RLS. for assignment. To print.

EXHIBIT E

AMENDED IN ASSEMBLY JULY 9, 2003

AMENDED IN ASSEMBLY JUNE 26, 2003

AMENDED IN SENATE MAY 22, 2003

AMENDED IN SENATE MAY 6, 2003

AMENDED IN SENATE MARCH 17, 2003

SENATE BILL**No. 186**

Introduced by Senator Murray

~~(Coauthor: Assembly Member Maldonado)~~

(Principal coauthor: Assembly Member Correa)

(Coauthors: Assembly Members Bermudez, Maldonado, and Simitian)

February 12, 2003

An act to add Article 1.8 (commencing with Section 17529) to Chapter 1 of Part 3 of Division 7 of the Business and Professions Code, relating to privacy.

LEGISLATIVE COUNSEL'S DIGEST

SB 186, as amended, Murray. Privacy: unsolicited e-mail advertising.

Existing law prohibits a person or entity conducting business in the state from e-mailing or causing to be e-mailed documents consisting of unsolicited advertising material for the lease, sale, rental, gift offer, or other disposition of any realty, goods, services, or extension of credit unless that person or entity establishes a toll-free telephone number or valid sender operated return e-mail address that a recipient may contact to notify the sender not to e-mail the recipient any further unsolicited

SB 186

— 2 —

documents. Existing law requires that notification of the toll-free telephone number, and a valid address that a recipient may write to, be included on these unsolicited e-mailed documents, and prohibits the e-mailing of these unsolicited advertising documents to a person who has requested not to receive any further unsolicited documents. Existing law requires certain unsolicited e-mail advertisements to contain a heading of “ADV:” or “ADV:ADLT.” A violation of the provisions governing advertising is a misdemeanor.

This bill would prohibit ~~an advertiser~~ *a person or entity* located in California from ~~using~~ *initiating or sending, or advertising in* unsolicited commercial e-mail advertisements. The bill would prohibit ~~an advertiser~~ *a person or entity* not located in California from ~~using~~ *initiating or sending, or advertising in* unsolicited commercial e-mail advertisements sent to a California e-mail address if the advertiser knows or should reasonably know that it is a California e-mail address. The bill would provide that if any part of these provisions or their application is held invalid, the invalidity would not affect the other provisions.

This bill would authorize the recipient of a commercial e-mail advertisement transmitted in violation of these prohibitions, the electronic mail service provider, or the Attorney General to bring an action to recover actual damages ~~and~~. *The bill would also authorize these parties to recover* liquidated damages of \$1,000 per transmitted message ~~or up to \$1,000,000 per incident, as defined, whichever is less,~~ subject to reduction by a court for specified reasons. The bill would also provide for an award of *reasonable* attorney’s fees and costs *to a prevailing plaintiff*. The bill would provide that a cause of action in existence prior to its enactment would be governed by the law in effect at the time it arose. The bill would enact other related provisions.

Because a violation of the bill would be a crime, it would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: yes.

The people of the State of California do enact as follows:

SECTION 1. Article 1.8 (commencing with Section 17529) is added to Chapter 1 of Part 3 of Division 7 of the Business and Professions Code, to read:

Article 1.8. Restrictions On Unsolicited Commercial E-mail Advertisers

17529. For the purpose of this article, the following definitions apply:

(a) “Advertiser” means a person or entity that advertises through the use of unsolicited commercial e-mail advertisements.

(b) “California electronic mail address” or “California e-mail address” means any of the following:

(1) An e-mail address furnished by an electronic mail service provider that sends bills for furnishing and maintaining that e-mail address to a mailing address in this state.

(2) An e-mail address ordinarily accessed from a computer located in this state.

(3) An e-mail address furnished to a resident of this state.

(c) “Commercial e-mail advertisement” means any electronic mail message initiated for the purpose of advertising or promoting the lease, sale, rental, gift offer, or other disposition of any property, goods, services, or extension of credit.

(d) “Direct consent” means that the recipient has expressly consented to receive the message, either in response to a clear and conspicuous request for the consent or at the recipient’s own initiative.

(e) “Domain name” means any alphanumeric designation that is registered with or assigned by any domain name registrar as part of an electronic address on the Internet.

(f) “Electronic mail” or “e-mail” means an electronic message that is transmitted between two or more telecommunications devices, computers, or electronic devices capable of receiving electronic messages, whether or not the message is converted to hard copy format after receipt or is viewed upon transmission or stored for later retrieval. “Electronic mail” or “e-mail” includes electronic messages that are transmitted through a local, regional, or global computer network.

SB 186

— 4 —

(g) “Electronic mail address” or “e-mail address” means a destination, commonly expressed as a string of characters, to which electronic mail can be sent or delivered. An “electronic mail address” or “e-mail address” may include a user name or mailbox and a reference to an Internet domain.

~~(h) “Incident” means a single transmission of substantially similar content.~~

~~(i)~~

(h) “Electronic mail service provider” means any person, including an Internet service provider, that is an intermediary in sending or receiving electronic mail or that provides to end users of the electronic mail service the ability to send or receive electronic mail.

(i) “Initiate the transmission of a commercial e-mail advertisement” means to transmit or cause to be transmitted a commercial e-mail advertisement or assist in the transmission of a commercial e-mail advertisement by providing electronic mail addresses where the advertisement may be sent, but does not include the routine transmission of the advertisement through the network or system of a telecommunications utility or an electronic mail service provider through its network or system.

(j) “Incident” means a single transmission or delivery by an advertiser or sender to a single recipient or to multiple recipients of unsolicited commercial e-mail containing substantially similar content.

(k) “Internet” has the meaning set forth in paragraph (6) of subdivision (e) of Section 17538.

~~(l)~~

(l) “Preexisting or current business relationship,” as used in connection with the sending of a commercial e-mail advertisement, means that the recipient has made an inquiry, application, purchase, or transaction, with or without consideration, regarding products or services offered by the sender.

~~(k)~~ Commercial e-mail advertisements sent pursuant to the exemption provided for a preexisting or current business relationship shall provide the recipient of the commercial e-mail advertisement with the ability to “opt-out” from receiving the commercial e-mail advertisement by calling a toll-free telephone number or by sending an “unsubscribe” e-mail to the sender of the

1 *commercial e-mail. This opt-out provision does not apply to*
 2 *recipients who are receiving free e-mail service.*

3 (m) “Recipient” means the addressee of ~~a~~ *an unsolicited*
 4 ~~commercial e-mail advertisement.~~ If an addressee of ~~a~~ *an*
 5 ~~unsolicited commercial e-mail advertisement~~ has one or more
 6 e-mail addresses to which ~~a~~ *an unsolicited* commercial e-mail
 7 ~~advertisement~~ is sent, the addressee shall be deemed to be a
 8 separate recipient for each e-mail address to which the
 9 ~~advertisement e-mail~~ is sent.

10 ~~(l)~~

11 (n) “Routine transmission” means the transmission, routing,
 12 relaying, handling, or storing of an electronic mail message
 13 through an automatic technical process. “Routine transmission”
 14 shall not include the sending, or the knowing participation in the
 15 sending, of unsolicited commercial e-mail.

16 (o) “Sender” means a person or entity who initiates the
 17 transmission of an unsolicited commercial e-mail or whose
 18 product, service, or Internet Web site is contained in, or
 19 accompanied by, an unsolicited commercial e-mail.

20 (p) “Unsolicited commercial e-mail advertisement” means a
 21 commercial e-mail advertisement sent to a recipient who meets
 22 both of the following criteria:

23 (1) The recipient has not provided direct consent to receive the
 24 commercial e-mail advertisement.

25 (2) The recipient does not have a preexisting or current
 26 business relationship, as defined in subdivision ~~(j)~~ (l), with the
 27 advertiser ~~of the realty promoting the lease, sale, rental, gift offer,~~
 28 ~~or other disposition of any property, goods, services, or extension~~
 29 ~~of credit.~~

30 ~~17529.1. (a) Notwithstanding any other provision of law, if~~
 31 ~~an advertiser is located in California, the advertiser shall not~~
 32 ~~advertise using an unsolicited commercial e-mail advertisement.~~

33 ~~(b) Notwithstanding any other provision of law, an advertiser~~
 34 ~~that is not located in California shall not advertise using an~~
 35 ~~unsolicited commercial e-mail advertisement that is sent to a~~
 36 ~~California e-mail address if the advertiser knows or should~~
 37 ~~reasonably foresee that the e-mail address is a California e-mail~~
 38 ~~address.~~

39 *17529.1. Notwithstanding any other provision of law, a*
 40 *person or entity may not do either of the following:*

SB 186

— 6 —

1 (a) Initiate or send an unsolicited commercial e-mail
 2 advertisement from California or advertise in an unsolicited
 3 commercial e-mail advertisement sent from California.

4 (b) Initiate or send an unsolicited commercial e-mail
 5 advertisement to a California electronic mail address, or advertise
 6 in an unsolicited commercial e-mail advertisement sent to a
 7 California electronic mail address.

8 (c) The provisions of this section are severable. If any provision
 9 of this section or its application is held invalid, that invalidity shall
 10 not affect any other provision or application that can be given
 11 effect without the invalid provision or application.

12 ~~17529.2. (a) In addition to any other remedies provided by~~
 13 ~~this article or by other provisions of law, a recipient of an~~
 14 ~~unsolicited commercial e-mail advertisement transmitted in~~
 15 ~~violation of Section 17529.1, the electronic mail service provider,~~
 16 ~~or the Attorney General may bring an action to recover, in addition~~
 17 ~~to actual damages, liquidated damages of one thousand dollars~~
 18 ~~(\$1,000) for each unsolicited commercial e-mail advertisement~~
 19 ~~transmitted in violation of this article, or one million dollars~~
 20 ~~(\$1,000,000) per incident, whichever is less. The recipient,~~
 21 ~~electronic mail service provider, or Attorney General, if the~~
 22 ~~prevailing party, may also recover attorney's fees and costs.~~
 23 ~~However, there shall not be a cause of action against an electronic~~
 24 ~~mail service provider that transmits the unsolicited commercial~~
 25 ~~e-mail advertisement over its computer network.~~

26 17529.2. (a) (1) In addition to any other remedies provided
 27 by this article or by any other provisions of law, a recipient of an
 28 unsolicited commercial e-mail advertisement transmitted in
 29 violation of Section 17529.1, the electronic mail service provider,
 30 or the Attorney General may bring an action to recover both of the
 31 following:

32 (A) Actual damages.

33 (B) Liquidated damages of one thousand dollars (\$1,000) for
 34 each unsolicited commercial e-mail advertisement transmitted in
 35 violation of Section 17529.1, up to one million dollars
 36 (\$1,000,000) per incident.

37 (2) The recipient, the electronic mail service provider, or the
 38 Attorney General, if the prevailing plaintiff, may also recover
 39 reasonable attorney's fees and costs.

1 (3) *However, there shall not be a cause of action against an*
 2 *electronic mail service provider that is only involved in the routine*
 3 *transmission of the unsolicited commercial e-mail advertisement*
 4 *over its computer network.*

5 (b) If the court finds that the defendant established and
 6 implemented, with due care, practices and procedures reasonably
 7 designed to effectively prevent unsolicited commercial e-mail
 8 advertisements that are in violation of this article, the court shall
 9 reduce the liquidated damages recoverable under subdivision (a)
 10 to a maximum of one hundred dollars (\$100) for each unsolicited
 11 commercial e-mail advertisement, or a maximum of one hundred
 12 thousand dollars (\$100,000) per incident, ~~whichever is less.~~

13 ~~(c) At the request of any party to an action brought pursuant to~~
 14 ~~this article, the court, in its discretion, may conduct all legal~~
 15 ~~proceedings in a manner as to protect the secrecy and security of~~
 16 ~~the computer, computer network, computer data, computer~~
 17 ~~program, and computer software involved in order to prevent~~
 18 ~~possible reoccurrence of the same or similar act by another person~~
 19 ~~and to protect the trade secrets of any party.~~

20 ~~17229.3. Nothing in this article shall be construed to have any~~
 21 ~~effect on the lawfulness or unlawfulness, under any other~~
 22 ~~provision of law, of the adoption, implementation, or enforcement~~
 23 ~~by a~~

24 17529.3. *Nothing in this article shall be construed to limit or*
 25 *restrict the adoption, implementation, or enforcement by a*
 26 *provider of Internet access service of a policy of declining to*
 27 *transmit, receive, route, relay, handle, or store certain types of*
 28 *electronic mail messages.*

29 17529.4. (a) *It is unlawful for any person or entity to collect*
 30 *electronic mail addresses posted on the Internet if the purpose of*
 31 *the collection is for the electronic mail addresses to be used by a*
 32 *sender to do either of the following:*

33 (1) *Initiate or send an unsolicited commercial e-mail*
 34 *advertisement from California, or advertise in an unsolicited*
 35 *commercial e-mail advertisement sent from California.*

36 (2) *Initiate or send an unsolicited commercial e-mail*
 37 *advertisement to a California electronic mail address, or advertise*
 38 *in an unsolicited commercial e-mail advertisement sent to*
 39 *California electronic mail address.*

SB 186

— 8 —

(b) *It is unlawful for any person or entity to use an electronic mail address obtained by using automated means based on a combination of names, letters, or numbers to do either of the following:*

(1) *Initiate or send an unsolicited commercial e-mail advertisement from California, or advertise in an unsolicited commercial e-mail advertisement sent from California.*

(2) *Initiate or send an unsolicited commercial e-mail advertisement to a California electronic mail address, or advertise in an unsolicited commercial e-mail advertisement sent to a California electronic mail address.*

(c) *It is unlawful for any person to use scripts or other automated means to register for multiple electronic mail accounts from which to do, or to enable another person to do, either of the following:*

(1) *Initiate or send an unsolicited commercial e-mail advertisement from California, or advertise in an unsolicited commercial e-mail advertisement sent from California.*

(2) *Initiate or send an unsolicited commercial e-mail advertisement to a California electronic mail address, or advertise in an unsolicited commercial e-mail advertisement sent to a California electronic mail address.*

17529.5. (a) *It is unlawful for any person or entity to advertise using an unsolicited commercial e-mail advertisement either sent from California or sent to a California electronic mail address if the advertiser knows or should reasonably foresee that the e-mail address is a California e-mail address under any of the following circumstances:*

(1) *The commercial e-mail advertisement contains or is accompanied by a third party's domain name without the permission of the third party.*

(2) *The commercial e-mail advertisement contains or is accompanied by falsified, misrepresented, obscured, or forged header information.*

(3) *The commercial e-mail advertisement has a subject line that a person knows would be likely to mislead a recipient, acting reasonably under the circumstances, about a material fact regarding the contents or subject matter of the message.*

SEC. 2. *A cause of action that is in existence before the effective date of this act shall not be affected by this act, but shall*

1 instead be governed by the law that was in effect at the time the
2 cause of action arose.

3 SEC. 3. No reimbursement is required by this act pursuant to
4 Section 6 of Article XIII B of the California Constitution because
5 the only costs that may be incurred by a local agency or school
6 district will be incurred because this act creates a new crime or
7 infraction, eliminates a crime or infraction, or changes the penalty
8 for a crime or infraction, within the meaning of Section 17556 of
9 the Government Code, or changes the definition of a crime within
10 the meaning of Section 6 of Article XIII B of the California
11 Constitution.



EXHIBIT F

AMENDED IN ASSEMBLY JULY 10, 2003

AMENDED IN ASSEMBLY JULY 9, 2003

AMENDED IN ASSEMBLY JUNE 26, 2003

AMENDED IN SENATE MAY 22, 2003

AMENDED IN SENATE MAY 6, 2003

AMENDED IN SENATE MARCH 17, 2003

SENATE BILL

No. 186

Introduced by Senator Murray

(Principal coauthor: Assembly Member Correa)

(Coauthors: Assembly Members Bermudez, Maldonado, and
Simitian)

February 12, 2003

An act to add Article 1.8 (commencing with Section 17529) to Chapter 1 of Part 3 of Division 7 of the Business and Professions Code, relating to privacy.

LEGISLATIVE COUNSEL'S DIGEST

SB 186, as amended, Murray. Privacy: unsolicited e-mail advertising.

Existing law prohibits a person or entity conducting business in the state from e-mailing or causing to be e-mailed documents consisting of unsolicited advertising material for the lease, sale, rental, gift offer, or other disposition of any realty, goods, services, or extension of credit unless that person or entity establishes a toll-free telephone number or valid sender operated return e-mail address that a recipient may contact to notify the sender not to e-mail the recipient any further unsolicited

SB 186

— 2 —

documents. Existing law requires that notification of the toll-free telephone number, and a valid address that a recipient may write to, be included on these unsolicited e-mailed documents, and prohibits the e-mailing of these unsolicited advertising documents to a person who has requested not to receive any further unsolicited documents. Existing law requires certain unsolicited e-mail advertisements to contain a heading of “ADV:” or “ADV:ADLT.” A violation of the provisions governing advertising is a misdemeanor.

This bill would prohibit a person or entity located in California from initiating or sending, or advertising in unsolicited commercial e-mail advertisements. The bill would prohibit a person or entity not located in California from initiating or sending, or advertising in unsolicited commercial e-mail advertisements sent to a California e-mail address ~~if the advertiser knows or should reasonably know that it is a California e-mail address~~. The bill would provide that if any part of these provisions or their application is held invalid, the invalidity would not affect the other provisions.

This bill would authorize the recipient of a commercial e-mail advertisement transmitted in violation of these prohibitions, the electronic mail service provider, or the Attorney General to bring an action to recover actual damages. The bill would also authorize these parties to recover liquidated damages of \$1,000 per transmitted message up to \$1,000,000 per incident, as defined, subject to reduction by a court for specified reasons. The bill would also provide for an award of reasonable attorney’s fees and costs to a prevailing plaintiff. The bill would provide that a cause of action in existence prior to its enactment would be governed by the law in effect at the time it arose. The bill would enact other related provisions.

Because a violation of the bill would be a crime, it would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: yes.

The people of the State of California do enact as follows:

SECTION 1. Article 1.8 (commencing with Section 17529) is added to Chapter 1 of Part 3 of Division 7 of the Business and Professions Code, to read:

Article 1.8. Restrictions On Unsolicited Commercial E-mail Advertisers

17529. For the purpose of this article, the following definitions apply:

(a) “Advertiser” means a person or entity that advertises through the use of unsolicited commercial e-mail advertisements.

(b) “California electronic mail address” or “California e-mail address” means any of the following:

(1) An e-mail address furnished by an electronic mail service provider that sends bills for furnishing and maintaining that e-mail address to a mailing address in this state.

(2) An e-mail address ordinarily accessed from a computer located in this state.

(3) An e-mail address furnished to a resident of this state.

(c) “Commercial e-mail advertisement” means any electronic mail message initiated for the purpose of advertising or promoting the lease, sale, rental, gift offer, or other disposition of any property, goods, services, or extension of credit.

(d) “Direct consent” means that the recipient has expressly consented to receive the message, either in response to a clear and conspicuous request for the consent or at the recipient’s own initiative.

(e) “Domain name” means any alphanumeric designation that is registered with or assigned by any domain name registrar as part of an electronic address on the Internet.

(f) “Electronic mail” or “e-mail” means an electronic message that is transmitted between two or more telecommunications devices, computers, or electronic devices capable of receiving electronic messages, whether or not the message is converted to hard copy format after receipt or is viewed upon transmission or stored for later retrieval. “Electronic mail” or “e-mail” includes electronic messages that are transmitted through a local, regional, or global computer network.

SB 186

— 4 —

1 (g) “Electronic mail address” or “e-mail address” means a
2 destination, commonly expressed as a string of characters, to
3 which electronic mail can be sent or delivered. An “electronic mail
4 address” or “e-mail address” may include a user name or mailbox
5 and a reference to an Internet domain.

6 (h) “Electronic mail service provider” means any person,
7 including an Internet service provider, that is an intermediary in
8 sending or receiving electronic mail or that provides to end users
9 of the electronic mail service the ability to send or receive
10 electronic mail.

11 (i) “Initiate the transmission of a commercial e-mail
12 advertisement” means to transmit or cause to be transmitted a
13 commercial e-mail advertisement or assist in the transmission of
14 a commercial e-mail advertisement by providing electronic mail
15 addresses where the advertisement may be sent, but does not
16 include the routine transmission of the advertisement through the
17 network or system of a telecommunications utility or an electronic
18 mail service provider through its network or system.

19 (j) “Incident” means a single transmission or delivery by an
20 advertiser or sender to a single recipient or to multiple recipients
21 of unsolicited commercial e-mail containing substantially similar
22 content.

23 (k) “Internet” has the meaning set forth in paragraph (6) of
24 subdivision (e) of Section 17538.

25 (l) “Preexisting or current business relationship,” as used in
26 connection with the sending of a commercial e-mail
27 advertisement, means that the recipient has made an inquiry,
28 application, purchase, or transaction, with or without
29 consideration, regarding products or services offered by the
30 sender. Commercial e-mail advertisements sent pursuant to the
31 exemption provided for a preexisting or current business
32 relationship shall provide the recipient of the commercial e-mail
33 advertisement with the ability to “opt-out” from receiving the
34 commercial e-mail advertisement by calling a toll-free telephone
35 number or by sending an “unsubscribe” e-mail to the sender of the
36 commercial e-mail. This opt-out provision does not apply to
37 recipients who are receiving free e-mail service.

38 (m) “Recipient” means the addressee of an unsolicited
39 commercial e-mail. If an addressee of an unsolicited commercial
40 e-mail has one or more e-mail addresses to which an unsolicited

1 commercial e-mail is sent, the addressee shall be deemed to be a
2 separate recipient for each e-mail address to which the e-mail is
3 sent.

4 (n) “Routine transmission” means the transmission, routing,
5 relaying, handling, or storing of an electronic mail message
6 through an automatic technical process. “Routine transmission”
7 shall not include the sending, or the knowing participation in the
8 sending, of unsolicited commercial e-mail.

9 (o) “Sender” means a person or entity who initiates the
10 transmission of an unsolicited commercial e-mail or whose
11 product, service, or Internet Web site is contained in, or
12 accompanied by, an unsolicited commercial e-mail.

13 (p) “Unsolicited commercial e-mail advertisement” means a
14 commercial e-mail advertisement sent to a recipient who meets
15 both of the following criteria:

16 (1) The recipient has not provided direct consent to receive the
17 commercial e-mail advertisement.

18 (2) The recipient does not have a preexisting or current
19 business relationship, as defined in subdivision (l), with the
20 advertiser promoting the lease, sale, rental, gift offer, or other
21 disposition of any property, goods, services, or extension of credit.

22 17529.1. Notwithstanding any other provision of law, a
23 person or entity may not do either of the following:

24 (a) Initiate or send an unsolicited commercial e-mail
25 advertisement from California or advertise in an unsolicited
26 commercial e-mail advertisement sent from California.

27 (b) Initiate or send an unsolicited commercial e-mail
28 advertisement to a California electronic mail address, or advertise
29 in an unsolicited commercial e-mail advertisement sent to a
30 California electronic mail address.

31 (c) The provisions of this section are severable. If any provision
32 of this section or its application is held invalid, that invalidity shall
33 not affect any other provision or application that can be given
34 effect without the invalid provision or application.

35 17529.2. (a) (1) In addition to any other remedies provided
36 by this article or by any other provisions of law, a recipient of an
37 unsolicited commercial e-mail advertisement transmitted in
38 violation of Section 17529.1, the electronic mail service provider,
39 or the Attorney General may bring an action to recover both of the
40 following:

SB 186

— 6 —

1 (A) Actual damages.

2 (B) Liquidated damages of one thousand dollars (\$1,000) for
3 each unsolicited commercial e-mail advertisement transmitted in
4 violation of Section 17529.1, up to one million dollars
5 (\$1,000,000) per incident.

6 (2) The recipient, the electronic mail service provider, or the
7 Attorney General, if the prevailing plaintiff, may also recover
8 reasonable attorney's fees and costs.

9 (3) However, there shall not be a cause of action against an
10 electronic mail service provider that is only involved in the routine
11 transmission of the unsolicited commercial e-mail advertisement
12 over its computer network.

13 (b) If the court finds that the defendant established and
14 implemented, with due care, practices and procedures reasonably
15 designed to effectively prevent unsolicited commercial e-mail
16 advertisements that are in violation of this article, the court shall
17 reduce the liquidated damages recoverable under subdivision (a)
18 to a maximum of one hundred dollars (\$100) for each unsolicited
19 commercial e-mail advertisement, or a maximum of one hundred
20 thousand dollars (\$100,000) per incident.

21 17529.3. Nothing in this article shall be construed to limit or
22 restrict the adoption, implementation, or enforcement by a
23 provider of Internet access service of a policy of declining to
24 transmit, receive, route, relay, handle, or store certain types of
25 electronic mail messages.

26 17529.4. (a) It is unlawful for any person or entity to collect
27 electronic mail addresses posted on the Internet if the purpose of
28 the collection is for the electronic mail addresses to be used by a
29 sender to do either of the following:

30 (1) Initiate or send an unsolicited commercial e-mail
31 advertisement from California, or advertise in an unsolicited
32 commercial e-mail advertisement sent from California.

33 (2) Initiate or send an unsolicited commercial e-mail
34 advertisement to a California electronic mail address, or advertise
35 in an unsolicited commercial e-mail advertisement sent to
36 California electronic mail address.

37 (b) It is unlawful for any person or entity to use an electronic
38 mail address obtained by using automated means based on a
39 combination of names, letters, or numbers to do either of the
40 following:

(1) Initiate or send an unsolicited commercial e-mail advertisement from California, or advertise in an unsolicited commercial e-mail advertisement sent from California.

(2) Initiate or send an unsolicited commercial e-mail advertisement to a California electronic mail address, or advertise in an unsolicited commercial e-mail advertisement sent to a California electronic mail address.

(c) It is unlawful for any person to use scripts or other automated means to register for multiple electronic mail accounts from which to do, or to enable another person to do, either of the following:

(1) Initiate or send an unsolicited commercial e-mail advertisement from California, or advertise in an unsolicited commercial e-mail advertisement sent from California.

(2) Initiate or send an unsolicited commercial e-mail advertisement to a California electronic mail address, or advertise in an unsolicited commercial e-mail advertisement sent to a California electronic mail address.

17529.5. (a) It is unlawful for any person or entity to advertise using an unsolicited commercial e-mail advertisement either sent from California or sent to a California electronic mail address if the advertiser knows or should reasonably foresee that the e-mail address is a California e-mail address under any of the address under any of the following circumstances:

(1) The commercial e-mail advertisement contains or is accompanied by a third party's domain name without the permission of the third party.

(2) The commercial e-mail advertisement contains or is accompanied by falsified, misrepresented, obscured, or forged header information.

(3) The commercial e-mail advertisement has a subject line that a person knows would be likely to mislead a recipient, acting reasonably under the circumstances, about a material fact regarding the contents or subject matter of the message.

SEC. 2. A cause of action that is in existence before the effective date of this act shall not be affected by this act, but shall instead be governed by the law that was in effect at the time the cause of action arose.

SEC. 3. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because

SB 186

— 8 —

1 the only costs that may be incurred by a local agency or school
2 district will be incurred because this act creates a new crime or
3 infraction, eliminates a crime or infraction, or changes the penalty
4 for a crime or infraction, within the meaning of Section 17556 of
5 the Government Code, or changes the definition of a crime within
6 the meaning of Section 6 of Article XIII B of the California
7 Constitution.

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EXHIBIT G

AMENDED IN ASSEMBLY AUGUST 18, 2003

AMENDED IN ASSEMBLY JULY 10, 2003

AMENDED IN ASSEMBLY JULY 9, 2003

AMENDED IN ASSEMBLY JUNE 26, 2003

AMENDED IN SENATE MAY 22, 2003

AMENDED IN SENATE MAY 6, 2003

AMENDED IN SENATE MARCH 17, 2003

SENATE BILL

No. 186

Introduced by Senator Murray

(Principal coauthor: Assembly Member Correa)

(Coauthors: Assembly Members Bermudez, Maldonado, and
Simitian)

February 12, 2003

An act to add Article 1.8 (commencing with Section 17529) to Chapter 1 of Part 3 of Division 7 of, *and to repeal Sections 17538.4 and 17538.41 of*, the Business and Professions Code, relating to privacy.

LEGISLATIVE COUNSEL'S DIGEST

SB 186, as amended, Murray. Privacy: unsolicited *commercial* e-mail advertising.

Existing law prohibits a person or entity conducting business in the state from e-mailing or causing to be e-mailed documents consisting of unsolicited advertising material for the lease, sale, rental, gift offer, or other disposition of any realty, goods, services, or extension of credit unless that person or entity establishes a toll-free telephone number or

valid sender operated return e-mail address that a recipient may contact to notify the sender not to e-mail the recipient any further unsolicited documents. Existing law requires that notification of the toll-free telephone number, and a valid address that a recipient may write to, be included on these unsolicited e-mailed documents, and prohibits the e-mailing of these unsolicited advertising documents to a person who has requested not to receive any further unsolicited documents. Existing law requires certain unsolicited e-mail advertisements to contain a heading of “ADV:” or “ADV:ADLT.” A violation of the provisions governing advertising is a misdemeanor.

This bill would delete these provisions. The bill would instead prohibit a person or entity located in California from initiating or, sending, or advertising in, unsolicited commercial e-mail advertisements. The bill would prohibit a person or entity not located in California from initiating or, sending, or advertising in, unsolicited commercial e-mail advertisements sent to a California e-mail address. The bill would provide that if any part of these provisions or their application is held invalid, the invalidity would not affect the other provisions. The bill would also prohibit a person or entity from collecting e-mail addresses or registering multiple e-mail addresses for the purpose of initiating or sending an unsolicited commercial e-mail advertisement from California or to a California e-mail address. The bill would prohibit a person or entity from sending a commercial e-mail advertisement containing certain falsified, misrepresented, obscured, or misleading information.

This bill would authorize the recipient of a commercial e-mail advertisement transmitted in violation of these prohibitions, the electronic mail service provider, or the Attorney General to bring an action to recover actual damages. The bill would also authorize these parties to recover liquidated damages of \$1,000 per transmitted message up to \$1,000,000 per incident, as defined, subject to reduction by a court for specified reasons. The bill would also provide for an award of reasonable attorney’s fees and costs to a prevailing plaintiff. The bill would provide that a cause of action in existence prior to its enactment would be governed by the law in effect at the time it arose. The bill would enact other related provisions.

This bill would provide that if any part of these provisions or their applications is deemed invalid, the invalidity would not affect other provisions.

Because a violation of the bill would be a crime, it would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: yes.

The people of the State of California do enact as follows:

SECTION 1. Article 1.8 (commencing with Section 17529) is added to Chapter 1 of Part 3 of Division 7 of the Business and Professions Code, to read:

Article 1.8. Restrictions On Unsolicited Commercial E-mail Advertisers

17529. *The Legislature hereby finds and declares all of the following:*

(a) *Roughly 40 percent of all e-mail traffic in the United States is comprised of unsolicited commercial e-mail advertisements (hereafter spam) and industry experts predict that by the end of 2003 half of all e-mail traffic will be comprised of spam.*

(b) *The increase in spam is not only an annoyance but is also an increasing drain on corporate budgets and possibly a threat to the continued usefulness of the most successful tool of the computer age.*

(c) *Complaints from irate business and home-computer users regarding spam have skyrocketed, and polls have reported that 74 percent of respondents favor making mass spamming illegal and only 12 percent are opposed, and that 80 percent of respondents consider spam very annoying.*

(d) *According to Ferris Research Inc., a San Francisco consulting group, spam will cost United States organizations more than ten billion dollars (\$10,000,000,000) this year, including lost productivity and the additional equipment, software, and manpower needed to combat the problem. California is 12 percent*

SB 186

— 4 —

1 of the United States population with an emphasis on technology
 2 business, and it is therefore estimated that spam costs California
 3 organizations well over 1.2 billion dollars (\$1,020,000,000).

4 (e) Like junk faxes, spam imposes a cost on users, using up
 5 valuable storage space in e-mail inboxes, as well as costly
 6 computer band width, and on networks and the computer servers
 7 that power them, and discourages people from using e-mail.

8 (f) Spam filters have not proven effective.

9 (g) Like traditional paper “junk” mail, spam can be annoying
 10 and waste time, but it also causes many additional problems
 11 because it is easy and inexpensive to create, but difficult and costly
 12 to eliminate.

13 (h) The “cost shifting” from senders of deceptive spam to
 14 Internet business and e-mail users has been likened to sending junk
 15 mail with postage due or making telemarketing calls to someone’s
 16 pay-per-minute cellular phone.

17 (i) Many spammers have become so adept at masking their
 18 tracks that they are rarely found, and are so technologically
 19 sophisticated that they can adjust their systems to counter special
 20 filters and other barriers against spam and can even electronically
 21 commandeer unprotected computers, turning them into
 22 spam-launching weapons of mass production.

23 (j) There is a need to regulate the advertisers who use spam, as
 24 well as the actual senders of the spam, because the actual senders
 25 can be difficult to track down due to some return addresses that
 26 show up on the display as “unknown” and many others being
 27 obvious fakes and they are often located offshore.

28 (k) The true beneficiaries of spam are the advertisers who
 29 benefit from the marketing derived from the advertisements.

30 (l) In addition, spam is responsible for virus proliferation that
 31 can cause tremendous damage both to individual computers and
 32 to business systems.

33 (m) Because of the above problems, it is necessary that spam be
 34 prohibited and that commercial advertising e-mails be regulated
 35 as set forth in this article.

36 17529.1. For the purpose of this article, the following
 37 definitions apply:

38 (a) “Advertiser” means a person or entity that advertises
 39 through the use of unsolicited commercial e-mail advertisements.

1 (b) “California electronic mail address” or “California e-mail
2 address” means any of the following:

3 (1) An e-mail address furnished by an electronic mail service
4 provider that sends bills for furnishing and maintaining that e-mail
5 address to a mailing address in this state.

6 (2) An e-mail address ordinarily accessed from a computer
7 located in this state.

8 (3) An e-mail address furnished to a resident of this state.

9 (c) “Commercial e-mail advertisement” means any electronic
10 mail message initiated for the purpose of advertising or promoting
11 the lease, sale, rental, gift offer, or other disposition of any
12 property, goods, services, or extension of credit.

13 (d) “Direct consent” means that the recipient has expressly
14 consented to receive ~~the message~~ *e-mail advertisements from the*
15 *advertiser*, either in response to a clear and conspicuous request for
16 the consent or at the recipient’s own initiative.

17 (e) “Domain name” means any alphanumeric designation that
18 is registered with or assigned by any domain name registrar as part
19 of an electronic address on the Internet.

20 (f) “Electronic mail” or “e-mail” means an electronic
21 message that is transmitted between two or more
22 telecommunications devices, computers, or electronic devices
23 capable of receiving electronic messages, whether or not the
24 message is converted to hard copy format after receipt or is viewed
25 upon transmission or stored for later retrieval. “Electronic mail”
26 or “e-mail” includes electronic messages that are transmitted
27 through a local, regional, or global computer network.

28 (g) “Electronic mail address” or “e-mail address” means a
29 destination, commonly expressed as a string of characters, to
30 which electronic mail can be sent or delivered. An “electronic mail
31 address” or “e-mail address” may ~~include~~ *consist of* a user name
32 or mailbox and a reference to an Internet domain.

33 (h) “Electronic mail service provider” means any person,
34 including an Internet service provider, that is an intermediary in
35 sending or receiving electronic mail or that provides to end users
36 of the electronic mail service the ability to send or receive
37 electronic mail.

38 (i) “Initiate the transmission of a commercial e-mail
39 advertisement” means to transmit or cause to be transmitted a
40 commercial e-mail advertisement or assist in the transmission of

SB 186

— 6 —

1 a commercial e-mail advertisement by providing electronic mail
 2 addresses where the advertisement may be sent, but does not
 3 include the routine transmission of the advertisement through the
 4 network or system of a telecommunications utility or an electronic
 5 mail service provider through its network or system.

6 (j) “Incident” means a single transmission or delivery by an
 7 advertiser or sender to a single recipient or to multiple recipients
 8 of unsolicited commercial e-mail *advertisement* containing
 9 substantially similar content.

10 (k) “Internet” has the meaning set forth in paragraph (6) of
 11 subdivision (e) of Section 17538.

12 (l) “Preexisting or current business relationship,” as used in
 13 connection with the sending of a commercial e-mail
 14 advertisement, means that the recipient has made an inquiry; *and*
 15 *has provided his or her e-mail address, or has made an application,*
 16 *purchase, or transaction, with or without consideration, regarding*
 17 *products or services offered by the sender.*

18 Commercial e-mail advertisements sent pursuant to the
 19 exemption provided for a preexisting or current business
 20 relationship shall provide the recipient of the commercial e-mail
 21 advertisement with the ability to “opt-out” from receiving ~~the~~
 22 *further commercial e-mail advertisement advertisements* by
 23 calling a toll-free telephone number or by sending an
 24 “unsubscribe” e-mail to the sender of the commercial e-mail
 25 *advertisement*. This opt-out provision does not apply to recipients
 26 who are receiving free e-mail service *with regard to commercial*
 27 *e-mail advertisements sent by the provider of the e-mail service.*

28 (m) “Recipient” means the addressee of an unsolicited
 29 commercial e-mail *advertisement*. If an addressee of an
 30 unsolicited commercial e-mail *advertisement* has one or more
 31 e-mail addresses to which an unsolicited commercial e-mail
 32 *advertisement* is sent, the addressee shall be deemed to be a
 33 separate recipient for each e-mail address to which the e-mail
 34 *advertisement* is sent.

35 (n) “Routine transmission” means the transmission, routing,
 36 relaying, handling, or storing of an electronic mail message
 37 through an automatic technical process. “Routine transmission”
 38 shall not include the sending, or the knowing participation in the
 39 sending, of unsolicited commercial e-mail *advertisements*.

(o) “Sender” means a person or entity who initiates the transmission of an unsolicited commercial e-mail ~~or whose product, service, or Internet Web site is contained in, or accompanied by, an unsolicited commercial e-mail advertisement.~~

(p) “Unsolicited commercial e-mail advertisement” means a commercial e-mail advertisement sent to a recipient who meets both of the following criteria:

(1) The recipient has not provided direct consent to receive ~~the commercial e-mail advertisement.~~ *advertisements from the advertiser.*

(2) The recipient does not have a preexisting or current business relationship, as defined in subdivision (l), with the advertiser promoting the lease, sale, rental, gift offer, or other disposition of any property, goods, services, or extension of credit. ~~17529.1.~~

17529.2. Notwithstanding any other provision of law, a person or entity may not do either of the following:

(a) Initiate or send an unsolicited commercial e-mail advertisement from California or advertise in an unsolicited commercial e-mail advertisement sent from California.

(b) Initiate or send an unsolicited commercial e-mail advertisement to a California electronic mail address, or advertise in an unsolicited commercial e-mail advertisement sent to a California electronic mail address.

(c) The provisions of this section are severable. If any provision of this section or its application is held invalid, that invalidity shall not affect any other provision or application that can be given effect without the invalid provision or application.

~~17529.2. (a) (1) In addition to any other remedies provided by this article or by any other provisions of law, a recipient of an unsolicited commercial e-mail advertisement transmitted in violation of Section 17529.1, the electronic mail service provider, or the Attorney General may bring an action to recover both of the following:~~

~~(A) Actual damages.~~

~~(B) Liquidated damages of one thousand dollars (\$1,000) for each unsolicited commercial e-mail advertisement transmitted in violation of Section 17529.1, up to one million dollars (\$1,000,000) per incident.~~

SB 186

— 8 —

~~(2) The recipient, the electronic mail service provider, or the Attorney General, if the prevailing plaintiff, may also recover reasonable attorney's fees and costs.~~

~~(3) However, there shall not be a cause of action against an electronic mail service provider that is only involved in the routine transmission of the unsolicited commercial e-mail advertisement over its computer network.~~

~~(b) If the court finds that the defendant established and implemented, with due care, practices and procedures reasonably designed to effectively prevent unsolicited commercial e-mail advertisements that are in violation of this article, the court shall reduce the liquidated damages recoverable under subdivision (a) to a maximum of one hundred dollars (\$100) for each unsolicited commercial e-mail advertisement, or a maximum of one hundred thousand dollars (\$100,000) per incident.~~

17529.3. Nothing in this article shall be construed to limit or restrict the adoption, implementation, or enforcement by a provider of Internet access service of a policy of declining to transmit, receive, route, relay, handle, or store certain types of electronic mail messages.

17529.4. (a) It is unlawful for any person or entity to collect electronic mail addresses posted on the Internet if the purpose of the collection is for the electronic mail addresses to be used by a sender to do either of the following:

(1) Initiate or send an unsolicited commercial e-mail advertisement from California, or advertise in an unsolicited commercial e-mail advertisement sent from California.

(2) Initiate or send an unsolicited commercial e-mail advertisement to a California electronic mail address, or advertise in an unsolicited commercial e-mail advertisement sent to California electronic mail address.

(b) It is unlawful for any person or entity to use an electronic mail address obtained by using automated means based on a combination of names, letters, or numbers to do either of the following:

(1) Initiate or send an unsolicited commercial e-mail advertisement from California, or advertise in an unsolicited commercial e-mail advertisement sent from California.

(2) Initiate or send an unsolicited commercial e-mail advertisement to a California electronic mail address, or advertise

1 in an unsolicited commercial e-mail advertisement sent to a
2 California electronic mail address.

3 (c) It is unlawful for any person to use scripts or other
4 automated means to register for multiple electronic mail accounts
5 from which to do, or to enable another person to do, either of the
6 following:

7 (1) Initiate or send an unsolicited commercial e-mail
8 advertisement from California, or advertise in an unsolicited
9 commercial e-mail advertisement sent from California.

10 (2) Initiate or send an unsolicited commercial e-mail
11 advertisement to a California electronic mail address, or advertise
12 in an unsolicited commercial e-mail advertisement sent to a
13 California electronic mail address.

14 17529.5. ~~(a)~~ It is unlawful for any person or entity to
15 advertise using ~~an unsolicited~~ a commercial e-mail advertisement
16 either sent from California or sent to a California electronic mail
17 address under any of the following circumstances:

18 ~~(1)~~

19 (a) The commercial e-mail advertisement contains or is
20 accompanied by a third party's domain name without the
21 permission of the third party.

22 ~~(2)~~

23 (b) The commercial e-mail advertisement contains or is
24 accompanied by falsified, misrepresented, obscured, or forged
25 header information. *This paragraph does not apply to truthful*
26 *information used by a third party who has been lawfully authorized*
27 *by the advertiser to use that information.*

28 ~~(3)~~

29 (c) The commercial e-mail advertisement has a subject line that
30 a person knows would be likely to mislead a recipient, acting
31 reasonably under the circumstances, about a material fact
32 regarding the contents or subject matter of the message.

33 17529.8. (a) (1) *In addition to any other remedies provided*
34 *by this article or by any other provisions of law, a recipient of an*
35 *unsolicited commercial e-mail advertisement transmitted in*
36 *violation of this article, an electronic mail service provider, or the*
37 *Attorney General may bring an action against an entity that*
38 *violates any provision of this article to recover either or both of the*
39 *following:*

40 (A) Actual damages.

SB 186

— 10 —

1 (B) Liquidated damages of one thousand dollars (\$1,000) for
 2 each unsolicited commercial e-mail advertisement transmitted in
 3 violation of Section 17529.2, up to one million dollars
 4 (\$1,000,000) per incident.

5 (2) The recipient, an electronic mail service provider, or the
 6 Attorney General, if the prevailing plaintiff, may also recover
 7 reasonable attorney's fees and costs.

8 (3) However, there shall not be a cause of action against an
 9 electronic mail service provider that is only involved in the routine
 10 transmission of the unsolicited commercial e-mail advertisement
 11 over its computer network.

12 (b) If the court finds that the defendant established and
 13 implemented, with due care, practices and procedures reasonably
 14 designed to effectively prevent unsolicited commercial e-mail
 15 advertisements that are in violation of this article, the court shall
 16 reduce the liquidated damages recoverable under subdivision (a)
 17 to a maximum of one hundred dollars (\$100) for each unsolicited
 18 commercial e-mail advertisement, or a maximum of one hundred
 19 thousand dollars (\$100,000) per incident.

20 17529.9. The provisions of this article are severable. If any
 21 provision of this article or its application is held invalid, that
 22 invalidity shall not affect any other provision or application that
 23 can be given effect without the invalid provision or application.

24 SEC. 2. Section 17538.4 of the Business and Professions
 25 Code is repealed.

26 ~~17538.4.—(a) No person or entity conducting business in this~~
 27 ~~state shall electronically mail (e-mail) or cause to be e-mailed~~
 28 ~~documents containing unsolicited advertising material for the~~
 29 ~~lease, sale, rental, gift offer, or other disposition of any realty,~~
 30 ~~goods, services, or extension of credit unless that person or entity~~
 31 ~~establishes a toll-free telephone number or valid sender operated~~
 32 ~~return e-mail address that the recipient of the unsolicited~~
 33 ~~documents may call or e-mail to notify the sender not to e-mail any~~
 34 ~~further unsolicited documents.~~

35 ~~(b) All unsolicited e-mailed documents subject to this section~~
 36 ~~shall include a statement informing the recipient of the toll-free~~
 37 ~~telephone number that the recipient may call, or a valid return~~
 38 ~~address to which the recipient may write or e-mail, as the case may~~
 39 ~~be, notifying the sender not to e-mail the recipient any further~~

1 ~~unsolicited documents to the e-mail address, or addresses,~~
2 ~~specified by the recipient.~~

3 ~~The statement shall be the first text in the body of the message~~
4 ~~and shall be of the same size as the majority of the text of the~~
5 ~~message.~~

6 ~~(c) Upon notification by a recipient of his or her request not to~~
7 ~~receive any further unsolicited e-mailed documents, no person or~~
8 ~~entity conducting business in this state shall e-mail or cause to be~~
9 ~~e-mailed any unsolicited documents to that recipient.~~

10 ~~(d) This section shall apply when the unsolicited e-mailed~~
11 ~~documents are delivered to a California resident via an electronic~~
12 ~~mail service provider's service or equipment located in this state.~~
13 ~~For these purposes "electronic mail service provider" means any~~
14 ~~business or organization qualified to do business in this state that~~
15 ~~provides individuals, corporations, or other entities the ability to~~
16 ~~send or receive electronic mail through equipment located in this~~
17 ~~state and that is an intermediary in sending or receiving electronic~~
18 ~~mail.~~

19 ~~(e) As used in this section, "unsolicited e-mailed documents"~~
20 ~~means any e-mailed document or documents consisting of~~
21 ~~advertising material for the lease, sale, rental, gift offer, or other~~
22 ~~disposition of any realty, goods, services, or extension of credit~~
23 ~~that meet both of the following requirements:~~

24 ~~(1) The documents are addressed to a recipient with whom the~~
25 ~~initiator does not have an existing business or personal~~
26 ~~relationship.~~

27 ~~(2) The documents are not sent at the request of, or with the~~
28 ~~express consent of, the recipient.~~

29 ~~(f) As used in this section, "e-mail" or "cause to be e-mailed"~~
30 ~~does not include or refer to the transmission of any documents by~~
31 ~~a telecommunications utility or Internet service provider to the~~
32 ~~extent that the telecommunications utility or Internet service~~
33 ~~provider merely carries that transmission over its network.~~

34 ~~(g) In the case of e-mail that consists of unsolicited advertising~~
35 ~~material for the lease, sale, rental, gift offer, or other disposition~~
36 ~~of any realty, goods, services, or extension of credit, the subject~~
37 ~~line of each and every message shall include "ADV:" as the first~~
38 ~~four characters. If these messages contain information that~~
39 ~~consists of unsolicited advertising material for the lease, sale,~~
40 ~~rental, gift offer, or other disposition of any realty, goods, services,~~

SB 186

— 12 —

1 or extension of credit that may only be viewed, purchased, rented,
 2 leased, or held in possession by an individual 18 years of age and
 3 older, the subject line of each and every message shall include
 4 “ADV:ADLT” as the first eight characters.

5 (h) An employer who is the registered owner of more than one
 6 e-mail address may notify the person or entity conducting business
 7 in this state e-mailing or causing to be e-mailed documents
 8 consisting of unsolicited advertising material for the lease, sale,
 9 rental, gift offer, or other disposition of any realty, goods, services,
 10 or extension of credit of the desire to cease e-mailing on behalf of
 11 all of the employees who may use employer-provided and
 12 employer-controlled e-mail addresses.

13 (i) This section, or any part of this section, shall become
 14 inoperative on and after the date that federal law is enacted that
 15 prohibits or otherwise regulates the transmission of unsolicited
 16 advertising by electronic mail (e-mail).

17 *SEC. 3. Section 17538.41 of the Business and Professions*
 18 *Code is repealed.*

19 17538.41. (a) (1) Except as provided in subdivision (b), (c),
 20 or (d), no person or entity conducting business in this state shall
 21 transmit or cause to be transmitted a text message advertisement
 22 to a cellular telephone or pager equipped with short message
 23 capability or any similar capability allowing the transmission of
 24 text messages. A text message advertisement is a message, the
 25 principal purpose of which is to promote the sale of goods or
 26 services to the recipient, consisting of advertising material for the
 27 lease, sale, rental, gift offer, or other disposition of any realty,
 28 goods, services, or extension of credit.

29 (2) This section shall apply when a text message advertisement
 30 is transmitted to a telephone number assigned for cellular
 31 telephone or pager service to a California resident.

32 (b) This section shall not apply to text messages transmitted at
 33 the direction of a person or entity offering cellular telephone or
 34 pager service if the subscriber is offered an option to not receive
 35 those text messages.

36 (c) This section shall not apply to text messages transmitted by
 37 a business that has an existing relationship with the subscriber if
 38 the subscriber is offered an option not to receive text messages
 39 from that business.

~~(d) This section shall not apply to text messages transmitted by an affiliate of a business that has an existing relationship with the subscriber, but only if the subscriber has provided consent to the business with which he or she has that relationship to receive text messages from affiliates of that business. "Affiliate" means any company that controls, is controlled by, or is under common control with, another company.~~

~~(e) Subdivision (a) shall not impose an obligation on a person or entity offering cellular or pager service to control the transmission of a text message unless the message is transmitted at the direction of that person or entity.~~

SEC. 4. A cause of action that is in existence before the effective date of this act shall not be affected by this act, but shall instead be governed by the law that was in effect at the time the cause of action arose.

~~*SEC. 3.*~~

SEC. 5. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

EXHIBIT H

AMENDED IN ASSEMBLY AUGUST 25, 2003

AMENDED IN ASSEMBLY AUGUST 18, 2003

AMENDED IN ASSEMBLY JULY 10, 2003

AMENDED IN ASSEMBLY JULY 9, 2003

AMENDED IN ASSEMBLY JUNE 26, 2003

AMENDED IN SENATE MAY 22, 2003

AMENDED IN SENATE MAY 6, 2003

AMENDED IN SENATE MARCH 17, 2003

SENATE BILL

No. 186

Introduced by Senator Murray

(Principal coauthor: Assembly Member Correa)

(Coauthors: Assembly Members Bermudez, Maldonado, and
Simitian)

February 12, 2003

An act to add Article 1.8 (commencing with Section 17529) to Chapter 1 of Part 3 of Division 7 of, and to repeal Sections 17538.4 and ~~17538.41~~ 17538.45 of, the Business and Professions Code, relating to privacy.

LEGISLATIVE COUNSEL'S DIGEST

SB 186, as amended, Murray. Privacy: unsolicited commercial e-mail advertising.

Existing law prohibits a person or entity conducting business in the state from e-mailing or causing to be e-mailed documents consisting of

SB 186

— 2 —

unsolicited advertising material for the lease, sale, rental, gift offer, or other disposition of any realty, goods, services, or extension of credit, *as specified*, unless that person or entity establishes a toll-free telephone number or valid sender operated return e-mail address that a recipient may contact to notify the sender not to e-mail the recipient any further unsolicited documents. Existing law requires that notification of the toll-free telephone number, and a valid address that a recipient may write to, be included on these unsolicited e-mailed documents, and prohibits the e-mailing of these unsolicited advertising documents to a person who has requested not to receive any further unsolicited documents *them*. Existing law requires certain unsolicited e-mail advertisements to contain a heading of “ADV:” or “ADV:ADLT.” *Existing law prohibits the registered user of an e-mail service provider or any individual, corporation, or other entity from using or causing to be used the provider’s equipment located in this state in violation of the provider’s policies with regard to unsolicited e-mail advertisements, as specified. Existing law authorizes an e-mail service provider whose policy is violated to bring a civil action to recover specified damages.* A violation of the provisions governing advertising is a misdemeanor.

This bill would delete these provisions. The bill would instead prohibit a person or entity located in California from initiating, sending, or advertising in, unsolicited commercial e-mail advertisements. The bill would prohibit a person or entity not located in California from initiating, sending, or advertising in, unsolicited commercial e-mail advertisements sent to a California e-mail address. The bill would also prohibit a person or entity from collecting e-mail addresses or registering multiple e-mail addresses for the purpose of initiating or sending an unsolicited commercial e-mail advertisement from California or to a California e-mail address. The bill would prohibit a person or entity from sending a commercial e-mail advertisement containing certain falsified, misrepresented, obscured, or misleading information.

This bill would authorize the recipient of a commercial e-mail advertisement transmitted in violation of these prohibitions, the electronic mail service provider, or the Attorney General to bring an action to recover actual damages. ~~The bill and~~ would also authorize these parties to recover liquidated damages of \$1,000 per transmitted message up to \$1,000,000 per incident, as defined, subject to reduction by a court for specified reasons. The bill would also provide for an award of reasonable attorney’s fees and costs to a prevailing plaintiff.

The bill would provide that a cause of action in existence prior to its enactment would be governed by the law in effect at the time it arose. The bill would enact other related provisions.

This bill would provide that if any part of these provisions or their applications is deemed invalid, the invalidity would not affect other provisions.

Because a violation of the bill would be a crime, it would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: yes.

The people of the State of California do enact as follows:

1 SECTION 1. Article 1.8 (commencing with Section 17529)
2 is added to Chapter 1 of Part 3 of Division 7 of the Business and
3 Professions Code, to read:

4
5 Article 1.8. Restrictions On Unsolicited Commercial E-mail
6 Advertisers
7

8 17529. The Legislature hereby finds and declares all of the
9 following:

10 (a) Roughly 40 percent of all e-mail traffic in the United States
11 is comprised of unsolicited commercial e-mail advertisements
12 (hereafter spam) and industry experts predict that by the end of
13 2003 half of all e-mail traffic will be comprised of spam.

14 (b) The increase in spam is not only an annoyance but is also
15 an increasing drain on corporate budgets and possibly a threat to
16 the continued usefulness of the most successful tool of the
17 computer age.

18 (c) Complaints from irate business and home-computer users
19 regarding spam have skyrocketed, and polls have reported that 74
20 percent of respondents favor making mass spamming illegal and

SB 186

— 4 —

1 only 12 percent are opposed, and that 80 percent of respondents
2 consider spam very annoying.

3 (d) According to Ferris Research Inc., a San Francisco
4 consulting group, spam will cost United States organizations more
5 than ten billion dollars (\$10,000,000,000) this year, including lost
6 productivity and the additional equipment, software, and
7 manpower needed to combat the problem. California is 12 percent
8 of the United States population with an emphasis on technology
9 business, and it is therefore estimated that spam costs California
10 organizations well over 1.2 billion dollars ~~(\$1,020,000,000)~~
11 ~~(\$1,200,000,000)~~.

12 (e) Like junk faxes, spam imposes a cost on users, using up
13 valuable storage space in e-mail inboxes, as well as costly
14 computer band width, and on networks and the computer servers
15 that power them, and discourages people from using e-mail.

16 (f) Spam filters have not proven effective.

17 (g) Like traditional paper “junk” mail, spam can be annoying
18 and waste time, but it also causes many additional problems
19 because it is easy and inexpensive to create, but difficult and costly
20 to eliminate.

21 (h) The “cost shifting” from senders of deceptive spam to
22 Internet business and e-mail users has been likened to sending junk
23 mail with postage due or making telemarketing calls to someone’s
24 pay-per-minute cellular phone.

25 (i) Many spammers have become so adept at masking their
26 tracks that they are rarely found, and are so technologically
27 sophisticated that they can adjust their systems to counter special
28 filters and other barriers against spam and can even electronically
29 commandeer unprotected computers, turning them into
30 spam-launching weapons of mass production.

31 (j) There is a need to regulate the advertisers who use spam, as
32 well as the actual senders of the spam, because the actual senders
33 can be difficult to track down due to some return addresses that
34 show up on the display as “unknown” and many others being
35 obvious fakes and they are often located offshore.

36 (k) The true beneficiaries of spam are the advertisers who
37 benefit from the marketing derived from the advertisements.

38 (l) In addition, spam is responsible for virus proliferation that
39 can cause tremendous damage both to individual computers and to
40 business systems.

(m) Because of the above problems, it is necessary that spam be prohibited and that commercial advertising e-mails be regulated as set forth in this article.

17529.1. For the purpose of this article, the following definitions apply:

(a) “Advertiser” means a person or entity that advertises through the use of unsolicited commercial e-mail advertisements.

(b) “California electronic mail address” or “California e-mail address” means any of the following:

(1) An e-mail address furnished by an electronic mail service provider that sends bills for furnishing and maintaining that e-mail address to a mailing address in this state.

(2) An e-mail address ordinarily accessed from a computer located in this state.

(3) An e-mail address furnished to a resident of this state.

(c) “Commercial e-mail advertisement” means any electronic mail message initiated for the purpose of advertising or promoting the lease, sale, rental, gift offer, or other disposition of any property, goods, services, or extension of credit.

(d) “Direct consent” means that the recipient has expressly consented to receive e-mail advertisements from the advertiser, either in response to a clear and conspicuous request for the consent or at the recipient’s own initiative.

(e) “Domain name” means any alphanumeric designation that is registered with or assigned by any domain name registrar as part of an electronic address on the Internet.

(f) “Electronic mail” or “e-mail” means an electronic message that is transmitted between two or more telecommunications devices, computers, or electronic devices capable of receiving electronic messages, whether or not the message is converted to hard copy format after receipt or is viewed upon transmission or stored for later retrieval. “Electronic mail” or “e-mail” includes electronic messages that are transmitted through a local, regional, or global computer network.

(g) “Electronic mail address” or “e-mail address” means a destination, commonly expressed as a string of characters, to which electronic mail can be sent or delivered. An “electronic mail address” or “e-mail address” ~~may consist~~ *consists* of a user name or mailbox and a reference to an Internet domain.

SB 186

— 6 —

1 (h) “Electronic mail service provider” means any person,
2 including an Internet service provider, that is an intermediary in
3 sending or receiving electronic mail or that provides to end users
4 of the electronic mail service the ability to send or receive
5 electronic mail.

6 (i) “Initiate the transmission of a commercial e-mail
7 advertisement” means to transmit or cause to be transmitted a
8 commercial e-mail advertisement or assist in the transmission of
9 a commercial e-mail advertisement by providing electronic mail
10 addresses where the advertisement may be sent, but does not
11 include the routine transmission of the advertisement through the
12 network or system of a telecommunications utility or an electronic
13 mail service provider through its network or system.

14 (j) “Incident” means a single transmission or delivery by an
15 advertiser or sender to a single recipient or to multiple recipients
16 of unsolicited commercial e-mail advertisement containing
17 substantially similar content.

18 (k) “Internet” has the meaning set forth in paragraph (6) of
19 subdivision (e) of Section 17538.

20 (l) “Preexisting or current business relationship,” as used in
21 connection with the sending of a commercial e-mail
22 advertisement, means that the recipient has made an inquiry and
23 has provided his or her e-mail address, or has made an application,
24 purchase, or transaction, with or without consideration, regarding
25 products or services offered by the sender.

26 Commercial e-mail advertisements sent pursuant to the
27 exemption provided for a preexisting or current business
28 relationship shall provide the recipient of the commercial e-mail
29 advertisement with the ability to “opt-out” from receiving further
30 commercial e-mail advertisements by calling a toll-free telephone
31 number or by sending an “unsubscribe” e-mail to the sender of the
32 commercial e-mail advertisement. This opt-out provision does not
33 apply to recipients who are receiving free e-mail service with
34 regard to commercial e-mail advertisements sent by the provider
35 of the e-mail service.

36 (m) “Recipient” means the addressee of an unsolicited
37 commercial e-mail advertisement. If an addressee of an
38 unsolicited commercial e-mail advertisement has one or more e-mail
39 addresses to which an unsolicited commercial e-mail
40 advertisement is sent, the addressee shall be deemed to be a

1 separate recipient for each e-mail address to which the e-mail
2 advertisement is sent.

3 (n) “Routine transmission” means the transmission, routing,
4 relaying, handling, or storing of an electronic mail message
5 through an automatic technical process. “Routine transmission”
6 shall not include the sending, or the knowing participation in the
7 sending, of unsolicited commercial e-mail advertisements.

8 (o) “Sender” means a person or entity who initiates the
9 transmission of an unsolicited commercial e-mail advertisement.

10 (p) “Unsolicited commercial e-mail advertisement” means a
11 commercial e-mail advertisement sent to a recipient who meets
12 both of the following criteria:

13 (1) The recipient has not provided direct consent to receive
14 advertisements from the advertiser.

15 (2) The recipient does not have a preexisting or current
16 business relationship, as defined in subdivision (l), with the
17 advertiser promoting the lease, sale, rental, gift offer, or other
18 disposition of any property, goods, services, or extension of credit.

19 17529.2. Notwithstanding any other provision of law, a
20 person or entity may not do either of the following:

21 (a) Initiate or send an unsolicited commercial e-mail
22 advertisement from California or advertise in an unsolicited
23 commercial e-mail advertisement sent from California.

24 (b) Initiate or send an unsolicited commercial e-mail
25 advertisement to a California electronic mail address, or advertise
26 in an unsolicited commercial e-mail advertisement sent to a
27 California electronic mail address.

28 (c) The provisions of this section are severable. If any provision
29 of this section or its application is held invalid, that invalidity shall
30 not affect any other provision or application that can be given
31 effect without the invalid provision or application.

32 17529.3. Nothing in this article shall be construed to limit or
33 restrict the adoption, implementation, or enforcement by a
34 provider of Internet access service of a policy of declining to
35 transmit, receive, route, relay, handle, or store certain types of
36 electronic mail messages.

37 17529.4. (a) It is unlawful for any person or entity to collect
38 electronic mail addresses posted on the Internet if the purpose of
39 the collection is for the electronic mail addresses to be used by a
40 sender to do either of the following:

SB 186

— 8 —

(1) Initiate or send an unsolicited commercial e-mail advertisement from California, or advertise in an unsolicited commercial e-mail advertisement sent from California.

(2) Initiate or send an unsolicited commercial e-mail advertisement to a California electronic mail address, or advertise in an unsolicited commercial e-mail advertisement sent to California electronic mail address.

(b) It is unlawful for any person or entity to use an electronic mail address obtained by using automated means based on a combination of names, letters, or numbers to do either of the following:

(1) Initiate or send an unsolicited commercial e-mail advertisement from California, or advertise in an unsolicited commercial e-mail advertisement sent from California.

(2) Initiate or send an unsolicited commercial e-mail advertisement to a California electronic mail address, or advertise in an unsolicited commercial e-mail advertisement sent to a California electronic mail address.

(c) It is unlawful for any person to use scripts or other automated means to register for multiple electronic mail accounts from which to do, or to enable another person to do, either of the following:

(1) Initiate or send an unsolicited commercial e-mail advertisement from California, or advertise in an unsolicited commercial e-mail advertisement sent from California.

(2) Initiate or send an unsolicited commercial e-mail advertisement to a California electronic mail address, or advertise in an unsolicited commercial e-mail advertisement sent to a California electronic mail address.

17529.5. It is unlawful for any person or entity to advertise using a commercial e-mail advertisement either sent from California or sent to a California electronic mail address under any of the following circumstances:

(a) The commercial e-mail advertisement contains or is accompanied by a third party's domain name without the permission of the third party.

(b) The commercial e-mail advertisement contains or is accompanied by falsified, misrepresented, obscured, or forged header information. This paragraph does not apply to truthful

1 information used by a third party who has been lawfully authorized
2 by the advertiser to use that information.

3 (c) The commercial e-mail advertisement has a subject line that
4 a person knows would be likely to mislead a recipient, acting
5 reasonably under the circumstances, about a material fact
6 regarding the contents or subject matter of the message.

7 17529.8. (a) (1) In addition to any other remedies provided
8 by this article or by any other provisions of law, a recipient of an
9 unsolicited commercial e-mail advertisement transmitted in
10 violation of this article, an electronic mail service provider, or the
11 Attorney General may bring an action against an entity that
12 violates any provision of this article to recover either or both of the
13 following:

14 (A) Actual damages.

15 (B) Liquidated damages of one thousand dollars (\$1,000) for
16 each unsolicited commercial e-mail advertisement transmitted in
17 violation of Section 17529.2, up to one million dollars
18 (\$1,000,000) per incident.

19 (2) The recipient, an electronic mail service provider, or the
20 Attorney General, if the prevailing plaintiff, may also recover
21 reasonable attorney's fees and costs.

22 (3) However, there shall not be a cause of action against an
23 electronic mail service provider that is only involved in the routine
24 transmission of the unsolicited commercial e-mail advertisement
25 over its computer network.

26 (b) If the court finds that the defendant established and
27 implemented, with due care, practices and procedures reasonably
28 designed to effectively prevent unsolicited commercial e-mail
29 advertisements that are in violation of this article, the court shall
30 reduce the liquidated damages recoverable under subdivision (a)
31 to a maximum of one hundred dollars (\$100) for each unsolicited
32 commercial e-mail advertisement, or a maximum of one hundred
33 thousand dollars (\$100,000) per incident.

34 17529.9. The provisions of this article are severable. If any
35 provision of this article or its application is held invalid, that
36 invalidity shall not affect any other provision or application that
37 can be given effect without the invalid provision or application.

38 SEC. 2. Section 17538.4 of the Business and Professions
39 Code is repealed.

SB 186

— 10 —

~~SEC. 3. Section 17538.41 of the Business and Professions Code is repealed.~~

~~SEC. 3. Section 17538.45 of the Business and Professions Code is repealed.~~

~~17538.45. (a) For purposes of this section, the following words have the following meanings:~~

~~(1) "Electronic mail advertisement" means any electronic mail message, the principal purpose of which is to promote, directly or indirectly, the sale or other distribution of goods or services to the recipient.~~

~~(2) "Unsolicited electronic mail advertisement" means any electronic mail advertisement that meets both of the following requirements:~~

~~(A) It is addressed to a recipient with whom the initiator does not have an existing business or personal relationship.~~

~~(B) It is not sent at the request of or with the express consent of the recipient.~~

~~(3) "Electronic mail service provider" means any business or organization qualified to do business in California that provides registered users the ability to send or receive electronic mail through equipment located in this state and that is an intermediary in sending or receiving electronic mail.~~

~~(4) "Initiation" of an unsolicited electronic mail advertisement refers to the action by the initial sender of the electronic mail advertisement. It does not refer to the actions of any intervening electronic mail service provider that may handle or retransmit the electronic message.~~

~~(5) "Registered user" means any individual, corporation, or other entity that maintains an electronic mail address with an electronic mail service provider.~~

~~(b) No registered user of an electronic mail service provider shall use or cause to be used that electronic mail service provider's equipment located in this state in violation of that electronic mail service provider's policy prohibiting or restricting the use of its service or equipment for the initiation of unsolicited electronic mail advertisements.~~

~~(c) No individual, corporation, or other entity shall use or cause to be used, by initiating an unsolicited electronic mail advertisement, an electronic mail service provider's equipment located in this state in violation of that electronic mail service~~

1 provider's policy prohibiting or restricting the use of its equipment
2 to deliver unsolicited electronic mail advertisements to its
3 registered users.

4 (d) An electronic mail service provider shall not be required to
5 create a policy prohibiting or restricting the use of its equipment
6 for the initiation or delivery of unsolicited electronic mail
7 advertisements.

8 (e) Nothing in this section shall be construed to limit or restrict
9 the rights of an electronic mail service provider under Section
10 230(e)(1) of Title 47 of the United States Code, or any decision of
11 an electronic mail service provider to permit or to restrict access
12 to or use of its system, or any exercise of its editorial function.

13 (f) (1) In addition to any other action available under law, any
14 electronic mail service provider whose policy on unsolicited
15 electronic mail advertisements is violated as provided in this
16 section may bring a civil action to recover the actual monetary loss
17 suffered by that provider by reason of that violation, or liquidated
18 damages of fifty dollars (\$50) for each electronic mail message
19 initiated or delivered in violation of this section, up to a maximum
20 of twenty-five thousand dollars (\$25,000) per day, whichever
21 amount is greater.

22 (2) In any action brought pursuant to paragraph (1), the court
23 may award reasonable attorney's fees to a prevailing party.

24 (3) (A) In any action brought pursuant to paragraph (1), the
25 electronic mail service provider shall be required to establish as an
26 element of its cause of action that prior to the alleged violation, the
27 defendant had actual notice of both of the following:

28 (i) The electronic mail service provider's policy on unsolicited
29 electronic mail advertising.

30 (ii) The fact that the defendant's unsolicited electronic mail
31 advertisements would use or cause to be used the electronic mail
32 service provider's equipment located in this state.

33 (B) In this regard, the Legislature finds that with rapid
34 advances in Internet technology, and electronic mail technology in
35 particular, Internet service providers are already experimenting
36 with embedding policy statements directly into the software
37 running on the computers used to provide electronic mail services
38 in a manner that displays the policy statements every time an
39 electronic mail delivery is requested. While the state of the
40 technology does not support such a finding at present, the

SB 186

— 12 —

1 ~~Legislature believes that, in a given case at some future date, a~~
2 ~~showing that notice was supplied via electronic means between the~~
3 ~~sending and receiving computers could be held to constitute actual~~
4 ~~notice to the sender for purposes of this paragraph.~~

5 ~~(4) A violation of this section shall not be subject to Section~~
6 ~~17534.~~

7 SEC. 4. A cause of action that is in existence before the
8 effective date of this act shall not be affected by this act, but shall
9 instead be governed by the law that was in effect at the time the
10 cause of action arose.

11 SEC. 5. No reimbursement is required by this act pursuant to
12 Section 6 of Article XIII B of the California Constitution because
13 the only costs that may be incurred by a local agency or school
14 district will be incurred because this act creates a new crime or
15 infraction, eliminates a crime or infraction, or changes the penalty
16 for a crime or infraction, within the meaning of Section 17556 of
17 the Government Code, or changes the definition of a crime within
18 the meaning of Section 6 of Article XIII B of the California
19 Constitution.

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EXHIBIT I

AMENDED IN ASSEMBLY SEPTEMBER 5, 2003

AMENDED IN ASSEMBLY AUGUST 25, 2003

AMENDED IN ASSEMBLY AUGUST 18, 2003

AMENDED IN ASSEMBLY JULY 10, 2003

AMENDED IN ASSEMBLY JULY 9, 2003

AMENDED IN ASSEMBLY JUNE 26, 2003

AMENDED IN SENATE MAY 22, 2003

AMENDED IN SENATE MAY 6, 2003

AMENDED IN SENATE MARCH 17, 2003

SENATE BILL

No. 186

Introduced by Senator Murray

(Principal coauthor: Assembly Member Correa)

(Coauthors: Assembly Members Bermudez, Maldonado, and
Simitian)

February 12, 2003

An act to *amend Section 17538.45 of, to add Article 1.8* (commencing with Section 17529) to Chapter 1 of Part 3 of Division 7 of, and to repeal ~~Sections Section 17538.4 and 17538.45~~ of, the Business and Professions Code, relating to privacy.

LEGISLATIVE COUNSEL'S DIGEST

SB 186, as amended, Murray. Privacy: unsolicited commercial e-mail advertising.

Existing law prohibits a person or entity conducting business in the state from e-mailing or causing to be e-mailed documents consisting of unsolicited advertising material, as specified, unless that person or entity establishes a toll-free telephone number or valid sender operated return e-mail address that a recipient may contact to notify the sender not to e-mail any further unsolicited documents. Existing law requires that notification of the toll-free telephone number, and a valid address that a recipient may write to, be included on these unsolicited e-mailed documents, and prohibits the e-mailing of these unsolicited advertising documents to a person who has requested not to receive them. Existing law requires certain unsolicited e-mail advertisements to contain a heading of “ADV:” or “ADV:ADLT.” ~~Existing law prohibits the registered user of an e-mail service provider or any individual, corporation, or other entity from using or causing to be used the provider’s equipment located in this state in violation of the provider’s policies with regard to unsolicited e-mail advertisements, as specified. Existing law authorizes an e-mail service provider whose policy is violated to bring a civil action to recover specified damages. A violation of the provisions governing advertising is a misdemeanor.~~

This bill would delete these provisions. The bill would instead prohibit a person or entity located in California from initiating, ~~sending~~, or advertising in, unsolicited commercial e-mail advertisements. The bill would prohibit a person or entity not located in California from initiating, ~~sending~~, or advertising in, unsolicited commercial e-mail advertisements sent to a California e-mail address. The bill would also prohibit a person or entity from collecting e-mail addresses or registering multiple e-mail addresses for the purpose of initiating or ~~sending~~ *advertising in* an unsolicited commercial e-mail advertisement from California or to a California e-mail address. The bill would prohibit a person or entity from ~~sending~~ *using* a commercial e-mail advertisement containing certain falsified, misrepresented, obscured, or misleading information.

This bill would authorize the recipient of a commercial e-mail advertisement transmitted in violation of these prohibitions, the electronic mail service provider, or the Attorney General to bring an action to recover actual damages and would authorize these parties to recover liquidated damages of \$1,000 per transmitted message up to \$1,000,000 per incident, as defined, subject to reduction by a court for specified reasons. The bill would ~~also~~ provide for an award of reasonable attorney’s fees and costs to a prevailing plaintiff. The bill

would provide that a cause of action in existence prior to its enactment would be governed by the law in effect at the time it arose. The bill would enact other related provisions.

Existing law prohibits the registered user of an e-mail service provider, or any individual, corporation, or other entity, from using or causing to be used the provider's equipment located in this state in violation of the provider's policies with regard to unsolicited e-mail advertisements. Existing law authorizes an e-mail service provider whose policy is violated to bring a civil action to recover specified damages.

This bill would prohibit an e-mail service provider from bringing an action under both this provision and other provisions being added by the bill for the same unsolicited e-mail advertisement.

This bill would provide that if any part of these provisions or their applications is deemed invalid, the invalidity would not affect other provisions.

Because a violation of the bill would be a crime, it would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: yes.

The people of the State of California do enact as follows:

1 SECTION 1. Article 1.8 (commencing with Section 17529)
2 is added to Chapter 1 of Part 3 of Division 7 of the Business and
3 Professions Code, to read:

4

5 Article 1.8. Restrictions On Unsolicited Commercial E-mail
6 Advertisers

7

8 17529. The Legislature hereby finds and declares all of the
9 following:

10 (a) Roughly 40 percent of all e-mail traffic in the United States
11 is comprised of unsolicited commercial e-mail advertisements

SB 186

— 4 —

1 (hereafter spam) and industry experts predict that by the end of
2 2003 half of all e-mail traffic will be comprised of spam.

3 (b) The increase in spam is not only an annoyance but is also
4 an increasing drain on corporate budgets and possibly a threat to
5 the continued usefulness of the most successful tool of the
6 computer age.

7 (c) Complaints from irate business and home-computer users
8 regarding spam have skyrocketed, and polls have reported that 74
9 percent of respondents favor making mass spamming illegal and
10 only 12 percent are opposed, and that 80 percent of respondents
11 consider spam very annoying.

12 (d) According to Ferris Research Inc., a San Francisco
13 consulting group, spam will cost United States organizations more
14 than ten billion dollars (\$10,000,000,000) this year, including lost
15 productivity and the additional equipment, software, and
16 manpower needed to combat the problem. California is 12 percent
17 of the United States population with an emphasis on technology
18 business, and it is therefore estimated that spam costs California
19 organizations well over 1.2 billion dollars (\$1,200,000,000).

20 (e) Like junk faxes, spam imposes a cost on users, using up
21 valuable storage space in e-mail inboxes, as well as costly
22 computer band width, and on networks and the computer servers
23 that power them, and discourages people from using e-mail.

24 (f) Spam filters have not proven effective.

25 (g) Like traditional paper “junk” mail, spam can be annoying
26 and waste time, but it also causes many additional problems
27 because it is easy and inexpensive to create, but difficult and costly
28 to eliminate.

29 (h) The “cost shifting” from ~~senders of deceptive spam~~
30 *deceptive spammers* to Internet business and e-mail users has been
31 likened to sending junk mail with postage due or making
32 telemarketing calls to someone’s pay-per-minute cellular phone.

33 (i) Many spammers have become so adept at masking their
34 tracks that they are rarely found, and are so technologically
35 sophisticated that they can adjust their systems to counter special
36 filters and other barriers against spam and can even electronically
37 commandeer unprotected computers, turning them into
38 spam-launching weapons of mass production.

39 (j) There is a need to regulate the advertisers who use spam, as
40 well as the ~~actual senders of the spam, because the actual senders~~

1 *spammers, because the actual spammers* can be difficult to track
2 down due to some return addresses that show up on the display as
3 “unknown” and many others being obvious fakes and they are
4 often located offshore.

5 (k) The true beneficiaries of spam are the advertisers who
6 benefit from the marketing derived from the advertisements.

7 (l) In addition, spam is responsible for virus proliferation that
8 can cause tremendous damage both to individual computers and to
9 business systems.

10 (m) Because of the above problems, it is necessary that spam
11 be prohibited and that commercial advertising e-mails be
12 regulated as set forth in this article.

13 17529.1. For the purpose of this article, the following
14 definitions apply:

15 (a) “Advertiser” means a person or entity that advertises
16 through the use of ~~unsolicited~~ commercial e-mail advertisements.

17 (b) “California electronic mail address” or “California e-mail
18 address” means any of the following:

19 (1) An e-mail address furnished by an electronic mail service
20 provider that sends bills for furnishing and maintaining that e-mail
21 address to a mailing address in this state.

22 (2) An e-mail address ordinarily accessed from a computer
23 located in this state.

24 (3) An e-mail address furnished to a resident of this state.

25 (c) “Commercial e-mail advertisement” means any electronic
26 mail message initiated for the purpose of advertising or promoting
27 the lease, sale, rental, gift offer, or other disposition of any
28 property, goods, services, or extension of credit.

29 (d) “Direct consent” means that the recipient has expressly
30 consented to receive e-mail advertisements from the advertiser,
31 either in response to a clear and conspicuous request for the
32 consent or at the recipient’s own initiative.

33 (e) “Domain name” means any alphanumeric designation that
34 is registered with or assigned by any domain name registrar as part
35 of an electronic address on the Internet.

36 (f) “Electronic mail” or “e-mail” means an electronic
37 message that is *sent to an e-mail address and* transmitted between
38 two or more telecommunications devices, computers, or
39 electronic devices capable of receiving electronic messages,
40 whether or not the message is converted to hard copy format after

SB 186

— 6 —

1 receipt or is viewed upon transmission or stored for later retrieval.
 2 “Electronic mail” or “e-mail” includes electronic messages that
 3 are transmitted through a local, regional, or global computer
 4 network.

5 (g) “Electronic mail address” or “e-mail address” means a
 6 destination, commonly expressed as a string of characters, to
 7 which electronic mail can be sent or delivered. An “electronic mail
 8 address” or “e-mail address” consists of a user name or mailbox
 9 and a reference to an Internet domain.

10 (h) “Electronic mail service provider” means any person,
 11 including an Internet service provider, that is an intermediary in
 12 sending or receiving electronic mail or that provides to end users
 13 of the electronic mail service the ability to send or receive
 14 electronic mail.

15 (i) ~~“Initiate the transmission of a commercial e-mail~~
 16 ~~advertisement”~~ “Initiate” means to transmit or cause to be
 17 transmitted a commercial e-mail advertisement or assist in the
 18 transmission of a commercial e-mail advertisement by providing
 19 electronic mail addresses where the advertisement may be sent, but
 20 does not include the routine transmission of the advertisement
 21 through the network or system of a telecommunications utility or
 22 an electronic mail service provider through its network or system.

23 (j) “Incident” means a single transmission or delivery ~~by an~~
 24 ~~advertiser or sender~~ to a single recipient or to multiple recipients
 25 of unsolicited commercial e-mail advertisement containing
 26 substantially similar content.

27 (k) “Internet” has the meaning set forth in paragraph (6) of
 28 subdivision (e) of Section 17538.

29 (l) “Preexisting or current business relationship,” as used in
 30 connection with the sending of a commercial e-mail
 31 advertisement, means that the recipient has made an inquiry and
 32 has provided his or her e-mail address, or has made an application,
 33 purchase, or transaction, with or without consideration, regarding
 34 products or services offered by the ~~sender~~ advertiser.

35 Commercial e-mail advertisements sent pursuant to the
 36 exemption provided for a preexisting or current business
 37 relationship shall provide the recipient of the commercial e-mail
 38 advertisement with the ability to “opt-out” from receiving further
 39 commercial e-mail advertisements by calling a toll-free telephone
 40 number or by sending an “unsubscribe” e-mail to the ~~sender of~~

1 *advertiser offering the products or services in the commercial*
 2 *e-mail advertisement. This opt-out provision does not apply to*
 3 *recipients who are receiving free e-mail service with regard to*
 4 *commercial e-mail advertisements sent by the provider of the*
 5 *e-mail service.*

6 (m) “Recipient” means the addressee of an unsolicited
 7 commercial e-mail advertisement. If an addressee of an
 8 unsolicited commercial e-mail advertisement has one or more ~~e-mail~~
 9 *e-mail* addresses to which an unsolicited commercial e-mail
 10 advertisement is sent, the addressee shall be deemed to be a
 11 separate recipient for each e-mail address to which the e-mail
 12 advertisement is sent.

13 (n) “Routine transmission” means the transmission, routing,
 14 relaying, handling, or storing of an electronic mail message
 15 through an automatic technical process. “Routine transmission”
 16 shall not include the sending, or the knowing participation in the
 17 sending, of unsolicited commercial e-mail advertisements.

18 (o) ~~“Sender” means a person or entity who initiates the~~
 19 ~~transmission of an unsolicited commercial e-mail advertisement.~~

20 ~~(p)~~ “Unsolicited commercial e-mail advertisement” means a
 21 commercial e-mail advertisement sent to a recipient who meets
 22 both of the following criteria:

23 (1) The recipient has not provided direct consent to receive
 24 advertisements from the advertiser.

25 (2) The recipient does not have a preexisting or current
 26 business relationship, as defined in subdivision (l), with the
 27 advertiser promoting the lease, sale, rental, gift offer, or other
 28 disposition of any property, goods, services, or extension of credit.

29 17529.2. Notwithstanding any other provision of law, a
 30 person or entity may not do ~~either~~ *any* of the following:

31 (a) ~~Initiate or send~~ *advertise in* an unsolicited commercial
 32 e-mail advertisement from California or ~~advertise in~~ an unsolicited
 33 commercial e-mail advertisement sent from California.

34 (b) ~~Initiate or send~~ *advertise in* an unsolicited commercial
 35 e-mail advertisement to a California electronic mail address, or
 36 ~~advertise in~~ an unsolicited commercial e-mail advertisement sent
 37 to a California electronic mail address.

38 (c) The provisions of this section are severable. If any provision
 39 of this section or its application is held invalid, that invalidity shall

SB 186

— 8 —

1 not affect any other provision or application that can be given
2 effect without the invalid provision or application.

3 17529.3. Nothing in this article shall be construed to limit or
4 restrict the adoption, implementation, or enforcement by a
5 provider of Internet access service of a policy of declining to
6 transmit, receive, route, relay, handle, or store certain types of
7 electronic mail messages.

8 17529.4. (a) It is unlawful for any person or entity to collect
9 electronic mail addresses posted on the Internet if the purpose of
10 the collection is for the electronic mail addresses to be used ~~by a~~
11 ~~sender~~ to do either of the following:

12 (1) Initiate or ~~send~~ *advertise in* an unsolicited commercial
13 e-mail advertisement from California, or advertise in an
14 unsolicited commercial e-mail advertisement sent from
15 California.

16 (2) Initiate or ~~send~~ *advertise in* an unsolicited commercial
17 e-mail advertisement to a California electronic mail address, or
18 advertise in an unsolicited commercial e-mail advertisement sent
19 to California electronic mail address.

20 (b) It is unlawful for any person or entity to use an electronic
21 mail address obtained by using automated means based on a
22 combination of names, letters, or numbers to do either of the
23 following:

24 (1) Initiate or ~~send~~ *advertise in* an unsolicited commercial
25 e-mail advertisement from California, or advertise in an
26 unsolicited commercial e-mail advertisement sent from
27 California.

28 (2) Initiate or ~~send~~ *advertise in* an unsolicited commercial
29 e-mail advertisement to a California electronic mail address, or
30 advertise in an unsolicited commercial e-mail advertisement sent
31 to a California electronic mail address.

32 (c) It is unlawful for any person to use scripts or other
33 automated means to register for multiple electronic mail accounts
34 from which to do, or to enable another person to do, either of the
35 following:

36 (1) Initiate or ~~send~~ *advertise in* an unsolicited commercial
37 e-mail advertisement from California, or advertise in an
38 unsolicited commercial e-mail advertisement sent from
39 California.

1 (2) Initiate or ~~send~~ *advertise in* an unsolicited commercial
2 e-mail advertisement to a California electronic mail address, or
3 advertise in an unsolicited commercial e-mail advertisement sent
4 to a California electronic mail address.

5 17529.5. It is unlawful for any person or entity to advertise
6 using a commercial e-mail advertisement either sent from
7 California or sent to a California electronic mail address under any
8 of the following circumstances:

9 (a) The commercial e-mail advertisement contains or is
10 accompanied by a third party's domain name without the
11 permission of the third party.

12 (b) The commercial e-mail advertisement contains or is
13 accompanied by falsified, misrepresented, obscured, or forged
14 header information. This paragraph does not apply to truthful
15 information used by a third party who has been lawfully authorized
16 by the advertiser to use that information.

17 (c) The commercial e-mail advertisement has a subject line that
18 a person knows would be likely to mislead a recipient, acting
19 reasonably under the circumstances, about a material fact
20 regarding the contents or subject matter of the message.

21 17529.8. (a) (1) In addition to any other remedies provided
22 by this article or by any other provisions of law, a recipient of an
23 unsolicited commercial e-mail advertisement transmitted in
24 violation of this article, an electronic mail service provider, or the
25 Attorney General may bring an action against an entity that
26 violates any provision of this article to recover either or both of the
27 following:

28 (A) Actual damages.

29 (B) Liquidated damages of one thousand dollars (\$1,000) for
30 each unsolicited commercial e-mail advertisement transmitted in
31 violation of Section 17529.2, up to one million dollars
32 (\$1,000,000) per incident.

33 (2) The recipient, an electronic mail service provider, or the
34 Attorney General, if the prevailing plaintiff, may also recover
35 reasonable attorney's fees and costs.

36 (3) However, there shall not be a cause of action against an
37 electronic mail service provider that is only involved in the routine
38 transmission of the unsolicited commercial e-mail advertisement
39 over its computer network.

SB 186

— 10 —

(b) If the court finds that the defendant established and implemented, with due care, practices and procedures reasonably designed to effectively prevent unsolicited commercial e-mail advertisements that are in violation of this article, the court shall reduce the liquidated damages recoverable under subdivision (a) to a maximum of one hundred dollars (\$100) for each unsolicited commercial e-mail advertisement, or a maximum of one hundred thousand dollars (\$100,000) per incident.

17529.9. The provisions of this article are severable. If any provision of this article or its application is held invalid, that invalidity shall not affect any other provision or application that can be given effect without the invalid provision or application.

SEC. 2. Section 17538.4 of the Business and Professions Code is repealed.

~~SEC. 3. Section 17538.45 of the Business and Professions Code is repealed.~~

SEC. 3. Section 17538.45 of the Business and Professions Code is amended to read:

17538.45. (a) For purposes of this section, the following words have the following meanings:

(1) “Electronic mail advertisement” means any electronic mail message, the principal purpose of which is to promote, directly or indirectly, the sale or other distribution of goods or services to the recipient.

(2) “Unsolicited electronic mail advertisement” means any electronic mail advertisement that meets both of the following requirements:

(A) It is addressed to a recipient with whom the initiator does not have an existing business or personal relationship.

(B) It is not sent at the request of or with the express consent of the recipient.

(3) “Electronic mail service provider” means any business or organization qualified to do business in California that provides registered users the ability to send or receive electronic mail through equipment located in this state and that is an intermediary in sending or receiving electronic mail.

(4) “Initiation” of an unsolicited electronic mail advertisement refers to the action by the initial sender of the electronic mail advertisement. It does not refer to the actions of

1 any intervening electronic mail service provider that may handle
2 or retransmit the electronic message.

3 (5) “Registered user” means any individual, corporation, or
4 other entity that maintains an electronic mail address with an
5 electronic mail service provider.

6 (b) No registered user of an electronic mail service provider
7 shall use or cause to be used that electronic mail service provider’s
8 equipment located in this state in violation of that electronic mail
9 service provider’s policy prohibiting or restricting the use of its
10 service or equipment for the initiation of unsolicited electronic
11 mail advertisements.

12 (c) No individual, corporation, or other entity shall use or cause
13 to be used, by initiating an unsolicited electronic mail
14 advertisement, an electronic mail service provider’s equipment
15 located in this state in violation of that electronic mail service
16 provider’s policy prohibiting or restricting the use of its equipment
17 to deliver unsolicited electronic mail advertisements to its
18 registered users.

19 (d) An electronic mail service provider shall not be required to
20 create a policy prohibiting or restricting the use of its equipment
21 for the initiation or delivery of unsolicited electronic mail
22 advertisements.

23 (e) Nothing in this section shall be construed to limit or restrict
24 the rights of an electronic mail service provider under Section
25 230(c)(1) of Title 47 of the United States Code, or any decision of
26 an electronic mail service provider to permit or to restrict access
27 to or use of its system, or any exercise of its editorial function.

28 (f) (1) In addition to any other action available under law, any
29 electronic mail service provider whose policy on unsolicited
30 electronic mail advertisements is violated as provided in this
31 section may bring a civil action to recover the actual monetary loss
32 suffered by that provider by reason of that violation, or liquidated
33 damages of fifty dollars (\$50) for each electronic mail message
34 initiated or delivered in violation of this section, up to a maximum
35 of twenty-five thousand dollars (\$25,000) per day, whichever
36 amount is greater.

37 (2) In any action brought pursuant to paragraph (1), the court
38 may award reasonable attorney’s fees to a prevailing party.

39 (3) (A) In any action brought pursuant to paragraph (1), the
40 electronic mail service provider shall be required to establish as an

SB 186

— 12 —

1 element of its cause of action that prior to the alleged violation, the
 2 defendant had actual notice of both of the following:

3 (i) The electronic mail service provider's policy on unsolicited
 4 electronic mail advertising.

5 (ii) The fact that the defendant's unsolicited electronic mail
 6 advertisements would use or cause to be used the electronic mail
 7 service provider's equipment located in this state.

8 (B) In this regard, the Legislature finds that with rapid
 9 advances in Internet technology, and electronic mail technology in
 10 particular, Internet service providers are already experimenting
 11 with embedding policy statements directly into the software
 12 running on the computers used to provide electronic mail services
 13 in a manner that displays the policy statements every time an
 14 electronic mail delivery is requested. While the state of the
 15 technology does not support such a finding at present, the
 16 Legislature believes that, in a given case at some future date, a
 17 showing that notice was supplied via electronic means between the
 18 sending and receiving computers could be held to constitute actual
 19 notice to the sender for purposes of this paragraph.

20 ~~(4) A violation of this section shall not be subject to Section~~
 21 ~~17534.~~

22 (4) (A) *An electronic mail service provider who has brought an*
 23 *action against a party for a violation subject to Section 17529.8*
 24 *shall not bring an action against that party under this section for*
 25 *the same unsolicited commercial electronic mail advertisement.*

26 (B) *An electronic mail service provider who has brought an*
 27 *action against a party for a violation of this section shall not bring*
 28 *an action against that party under Section 17529.8 for the same*
 29 *unsolicited commercial electronic mail advertisement.*

30 SEC. 4. A cause of action that is in existence before the
 31 effective date of this act shall not be affected by this act, but shall
 32 instead be governed by the law that was in effect at the time the
 33 cause of action arose.

34 SEC. 5. No reimbursement is required by this act pursuant to
 35 Section 6 of Article XIII B of the California Constitution because
 36 the only costs that may be incurred by a local agency or school
 37 district will be incurred because this act creates a new crime or
 38 infraction, eliminates a crime or infraction, or changes the penalty
 39 for a crime or infraction, within the meaning of Section 17556 of
 40 the Government Code, or changes the definition of a crime within

1 the meaning of Section 6 of Article XIII B of the California
2 Constitution.

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EXHIBIT J

SENATE BILL

No. 1457

Introduced by Senator Murray

February 19, 2004

An act to amend Sections 17529.1, 17529.5, and 17529.8 of the Business and Professions Code, relating to business.

LEGISLATIVE COUNSEL'S DIGEST

SB 1457, as introduced, Murray. Commercial e-mail advertisements.

Existing state law prohibits a person or entity from collecting e-mail addresses or registering multiple e-mail addresses for purposes of the initiation or advertisement in an unsolicited commercial e-mail advertisement sent from California or to a California e-mail address. Existing state law also prohibits a person or entity from advertising in a commercial e-mail advertisement that is sent either from California or to a California e-mail address if the e-mail contains or is accompanied by certain falsified, misrepresented, obscured, or misleading information. Existing state law authorizes the recipient of an unsolicited commercial e-mail advertisement transmitted in violation of these prohibitions, the e-mail service provider, or the Attorney General to bring an action to recover actual damages, and authorizes a court to award reasonable attorney's fees and costs to a prevailing plaintiff. A violation of the provisions governing advertising is a misdemeanor.

This bill would define commercial e-mail advertisements to include both solicited and unsolicited advertisements. The bill would prohibit a person or entity from initiating or advertising in a commercial e-mail advertisement either sent from California or sent to a California e-mail address if the e-mail or an attachment to the e-mail contains or is accompanied by any false, misrepresented, obscured, forged, or

SB 1457

— 2 —

misleading information. The bill would also prohibit a commercial e-mail advertisement sent from California or to a California e-mail address, or an attachment thereto, from containing a statement that includes deceptive information regarding the authorization by the recipient to send commercial e-mail advertisements or regarding opting out of receiving future commercial e-mail advertisements. This bill would authorize the recipient of an e-mail advertisement transmitted in violation of any of the above provisions, the e-mail service provider, or the Attorney General to bring an action to recover actual damages and liquidated damages of \$1,000 per e-mail advertisement transmitted in violation of the provisions, up to \$1,000,000 per incident, subject to reduction by the court, and would authorize the award of reasonable attorney's fees and costs to a prevailing plaintiff.

Because a violation of the bill would be a crime, it would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: yes.

The people of the State of California do enact as follows:

- 1 SECTION 1. Section 17529.1 of the Business and Professions
- 2 Code is amended to read:
- 3 17529.1. For the purpose of this article, the following
- 4 definitions apply:
- 5 (a) "Advertiser" means a person or entity that advertises
- 6 through the use of commercial e-mail advertisements.
- 7 (b) "California electronic mail address" or "California e-mail
- 8 address" means any of the following:
- 9 (1) An e-mail address furnished by an electronic mail service
- 10 provider that sends bills for furnishing and maintaining that e-mail
- 11 address to a mailing address in this state.
- 12 (2) An e-mail address ordinarily accessed from a computer
- 13 located in this state.
- 14 (3) An e-mail address furnished to a resident of this state.

1 (c) “Commercial e-mail advertisement” means any electronic
2 mail message, *whether solicited or unsolicited, that is* initiated for
3 the purpose of advertising or promoting the lease, sale, rental, gift
4 offer, or other disposition of any property, goods, services, or
5 extension of credit.

6 (d) “Direct consent” means that the recipient has expressly
7 consented to receive e-mail advertisements from the advertiser,
8 either in response to a clear and conspicuous request for the
9 consent or at the recipient’s own initiative.

10 (e) “Domain name” means any alphanumeric designation that
11 is registered with or assigned by any domain name registrar as part
12 of an electronic address on the Internet.

13 (f) “Electronic mail” or “e-mail” means an electronic
14 message that is sent to an e-mail address and transmitted between
15 two or more telecommunications devices, computers, or
16 electronic devices capable of receiving electronic messages,
17 whether or not the message is converted to hard copy format after
18 receipt or is viewed upon transmission or stored for later retrieval.
19 “Electronic mail” or “e-mail” includes electronic messages that
20 are transmitted through a local, regional, or global computer
21 network.

22 (g) “Electronic mail address” or “e-mail address” means a
23 destination, commonly expressed as a string of characters, to
24 which electronic mail can be sent or delivered. An “electronic mail
25 address” or “e-mail address” consists of a user name or mailbox
26 and a reference to an Internet domain.

27 (h) “Electronic mail service provider” means any person,
28 including an Internet service provider, that is an intermediary in
29 sending or receiving electronic mail or that provides to end users
30 of the electronic mail service the ability to send or receive
31 electronic mail.

32 (i) “Initiate” means to transmit or cause to be transmitted a
33 commercial e-mail advertisement or assist in the transmission of
34 a commercial e-mail advertisement by providing electronic mail
35 addresses where the advertisement may be sent, but does not
36 include the routine transmission of the advertisement through the
37 network or system of a telecommunications utility or an electronic
38 mail service provider through its network or system.

39 (j) “Incident” means a single transmission or delivery to a
40 single recipient or to multiple recipients of ~~unsolicited a~~

SB 1457

— 4 —

1 commercial e-mail advertisement containing substantially similar
2 content.

3 (k) “Internet” has the meaning set forth in paragraph (6) of
4 subdivision (e) of Section 17538.

5 (l) “Preexisting or current business relationship,” as used in
6 connection with the sending of a commercial e-mail
7 advertisement, means that the recipient has made an inquiry and
8 has provided his or her e-mail address, or has made an application,
9 purchase, or transaction, with or without consideration, regarding
10 products or services offered by the advertiser.

11 Commercial e-mail advertisements sent pursuant to the
12 exemption provided for a preexisting or current business
13 relationship shall provide the recipient of the commercial e-mail
14 advertisement with the ability to “opt-out” from receiving further
15 commercial e-mail advertisements by calling a toll-free telephone
16 number or by sending an “unsubscribe” e-mail to the advertiser
17 offering the products or services in the commercial e-mail
18 advertisement. This opt-out provision does not apply to recipients
19 who are receiving free e-mail service with regard to commercial
20 e-mail advertisements sent by the provider of the e-mail service.

21 (m) “Recipient” means the addressee of ~~an unsolicited a~~
22 commercial e-mail advertisement. If an addressee of ~~an~~
23 ~~unsolicited a~~ commercial e-mail advertisement has one or more
24 e-mail addresses to which ~~an unsolicited a~~ commercial e-mail
25 advertisement is sent, the addressee shall be deemed to be a
26 separate recipient for each e-mail address to which the e-mail
27 advertisement is sent.

28 (n) “Routine transmission” means the transmission, routing,
29 relaying, handling, or storing of an electronic mail message
30 through an automatic technical process. “Routine transmission”
31 shall not include the sending, or the knowing participation in the
32 sending, of ~~unsolicited~~ commercial e-mail advertisements.

33 (o) “Unsolicited commercial e-mail advertisement” means a
34 commercial e-mail advertisement sent to a recipient who meets
35 both of the following criteria:

36 (1) The recipient has not provided direct consent to receive
37 advertisements from the advertiser.

38 (2) The recipient does not have a preexisting or current
39 business relationship, as defined in subdivision (l), with the

1 advertiser promoting the lease, sale, rental, gift offer, or other
2 disposition of any property, goods, services, or extension of credit.

3 SEC. 2. Section 17529.5 of the Business and Professions
4 Code is amended to read:

5 17529.5. It is unlawful for any person or entity to *initiate or*
6 *advertise using* in a commercial e-mail advertisement either sent
7 from California or sent to a California electronic mail address
8 under any of the following circumstances:

9 (a) The ~~commercial~~ e-mail advertisement contains or is
10 accompanied by a third party's domain name without the
11 permission of the third party.

12 (b) The ~~commercial~~ e-mail advertisement contains or is
13 accompanied by falsified, misrepresented, obscured, or forged
14 header information. This ~~paragraph~~ *subdivision* does not apply to
15 truthful information used by a ~~third party~~ *third-party* who has been
16 lawfully authorized by the advertiser to use that information.

17 (c) The ~~commercial~~ e-mail advertisement has a subject line that
18 a person knows would be likely to mislead a recipient, acting
19 reasonably under the circumstances, about a material fact
20 regarding the contents or subject matter of the message.

21 (d) *The e-mail advertisement, or an attachment to the*
22 *advertisement, contains or is accompanied by false,*
23 *misrepresented, obscured, forged, or misleading information.*

24 (e) *The e-mail advertisement, or an attachment to the*
25 *advertisement, is accompanied by a statement that includes*
26 *deceptive information regarding either:*

27 (1) *Authorization by the recipient to send commercial e-mail*
28 *advertisements to that recipient.*

29 (2) *Opting out of receiving future commercial e-mail*
30 *advertisements.*

31 SEC. 3. Section 17529.8 of the Business and Professions
32 Code is amended to read:

33 17529.8. (a) (1) In addition to any other remedies provided
34 by this article or by any other provisions of law, a recipient of an
35 ~~unsolicited commercial~~ e-mail advertisement transmitted in
36 violation of this article, an electronic mail service provider, or the
37 Attorney General may bring an action against an entity that
38 violates any provision of this article to recover either or both of the
39 following:

40 (A) Actual damages.

SB 1457

— 6 —

(B) Liquidated damages of one thousand dollars (\$1,000) for each ~~unsolicited commercial~~ e-mail advertisement transmitted in violation of ~~Section 17529.2~~ *this article*, up to one million dollars (\$1,000,000) per incident.

(2) The recipient, an electronic mail service provider, or the Attorney General, if the prevailing plaintiff, may also recover reasonable attorney's fees and costs.

(3) However, there shall not be a cause of action against an electronic mail service provider that is only involved in the routine transmission of the ~~unsolicited commercial~~ e-mail advertisement over its computer network.

(b) If the court finds that the defendant established and implemented, with due care, practices and procedures reasonably designed to effectively prevent ~~unsolicited commercial~~ e-mail advertisements that are in violation of this article, the court shall reduce the liquidated damages recoverable under subdivision (a) to a maximum of one hundred dollars (\$100) for each ~~unsolicited commercial~~ e-mail advertisement, or a maximum of one hundred thousand dollars (\$100,000) per incident.

SEC. 4. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

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EXHIBIT K

SB 1457

Page 1

Date of Hearing: June 22, 2004

ASSEMBLY COMMITTEE ON JUDICIARY

Ellen M. Corbett, Chair

SB 1457 (Murray) - As Amended: June 17, 2004

SENATE VOTE : 22-5

SUBJECT : ~~COMMERCIAL E~~ EMAIL "SPAM": FEDERAL COMFORMITY

KEY ISSUE : SHOULD RECENT STATE LAW BANNING E-MAIL SPAM BE
UPDATED?

SYNOPSIS

The bill was recently amended in the Business and Professions Committee to address various technical drafting concerns and clarify that the penalties contained in state law apply to all falsified email -- whether solicited or unsolicited. The latest amendments strike changes to existing law with the exception of deleting the word "obscured" in Section 17529.5 (b) of the measure. With the latest amendments the bill mirrors the penalty provisions of Section 17529.8, and creates a "stand alone" section for falsified emails, including penalties, to avoid confusion as to what parts of existing state law are preempted by federal law and what parts remain viable in this area. In support of the bill, the author states that the measure is intended to merely provide clean-up language, and ensure that the private right of action against "spammers" who use falsified headers, which was created in his legislation last year and is not in conflict with federal law, remains intact. The bill was recently amended and passed in the Business and Professions Committee, and the California Bankers Association and the American Insurance Association are opposed to the bill.

SUMMARY: Provides clean-up language and ensure a private right of action against spammers who use falsified headers, which is not in conflict with federal law.

Specifically, this bill :

2)Deletes the word "obscured" from existing law pertaining to commercial e-mails.

3)Mirrors the penalty provisions of Section 17529.8, and creates

SB 1457

Page 2

a "stand alone" section for falsified emails, including

penalties, to avoid confusion as to what parts of existing state law are preempted by federal law and what parts remain viable in this area. The penalties allow the e-mail service provider, or the Attorney General, to bring an action to recover damages of \$1,000 for each unsolicited e-mail (up to \$1 million per incident). Also authorizes a court to award reasonable attorney's fees and costs to a prevailing plaintiff in violation of this section.

EXISTING LAW :

- 1)Regulates false and misleading advertising and subjects violators to both civil and criminal penalties.
- 5)Prohibits a person or entity from advertising using a commercial e-mail advertisement either sent from California or to a California e-mail address under any of the following circumstances:
 - 5) The advertisement contains or is accompanied by a third party's domain name without the permission of the third party;
 - 5) The advertisement contains or is accompanied by falsified, misrepresented, obscured, or forged information; or,
 - 5) The advertisement has a subject line that a person knows would likely mislead a recipient about a material fact regarding the contents or subject matter.

Existing federal law :

- 1)Applies to all commercial e-mail with the exception of specific transactional messages like warranty, product recall, or confirmation of transaction information.
- 2)Requires that commercial e-mail be labeled, have a valid return address, and a physical address.
- 3)Requires that e-mailers allow recipients to opt out of receiving further commercial e-mail and provides senders 10 business days to process opt out requests.

SB 1457

Page 3

- 4)Prohibits the use of deceptive subject lines and false headers in such messages.
- 5)Prohibits harvesting e-mail addresses from web sites.
- 6)Provides criminal penalties for fraudulent headers and using other people's e-mail accounts or computers to send commercial e-mail, including fines and imprisonment up to 5 years.
- 7)Includes civil enforcement by the Federal Trade Commission

(FTC), state Attorneys General, or Internet Service Providers (ISPs), including actual damages and statutory damages up to \$250 per e-mail, with a cap of \$2 million per incident, or \$6 million if the violation of the law is willful.

- 8)Preempts any state law that regulates the use of e-mail to send commercial messages but allows state laws that address falsity and deception to remain in place.

FISCAL EFFECT : As currently in print this bill is keyed fiscal.

COMMENTS : In support of the bill, the author states that the measure is intended to merely provide clean-up language, and ensure that the private right of action against "spammers" who use falsified headers, which was created in his legislation last year and is not in conflict with federal law, remains intact. The bill was recently amended and passed in the Business and Professions Committee, but opposition remains.

Last year, SB 186 (Murray), Chapter 487, Statutes of 2003, completely banned the sending of e-mail spam in California. To enforce this ban, SB 186 created a private right of action whereby a consumer or an ISP could sue spammers and recover damages. At the time, SB 186 was the strongest anti-spam legislation in the country as it offered a complete ban with penalties of \$1,000 per e-mail, up to \$1 million per incident. SB 186 was unique in that it also held the "advertiser" liable. This was meant to ensure that a money trail could be traced and violators easily located. Previous anti-spam laws focused solely on the spammers, who can often be impossible to trace.

Within months of passage, SB 186 was preempted by a federal bill (S. 877), which allows for the sending of spam as long as various conditions are met. These conditions include having the ability to opt-out, a valid e-mail address contact and

SB 1457

Page 4

disclosure of the name and location of the sender of the spam. Although this federal measure preempted California's complete prohibition of spam, it did not preempt the private right of action consumers and ISPs have against those who send spam with misleading or falsified headers and information, as well as the advertisers of those products. SB 1457 is intended to merely provide clean-up language and ensure a private right of action against spammers who use falsified headers, which is not in conflict with federal law.

Recent Author's Amendments : As noted above, the bill was recently amended in the Business and Professions Committee to address various technical drafting concerns and clarify that the penalties contained in state law apply to all falsified email -- whether solicited or unsolicited. The latest amendments strike changes to existing law with the exception of deleting the word "obscured" in Section 17529.5 (b) of the measure. With the latest amendments the bill seeks to mirror the penalty provisions of Section 17529.8, and creates a "stand alone"

section for falsified emails, including penalties, to avoid confusion as to what parts of existing state law are preempted by federal law and what parts remain viable in this area.

ARGUMENTS IN OPPOSITION : Both the California Bankers Association (CBA) and the American Insurance Association (AIA) are opposed to the bill unless amended to clarify that the inclusion of advertisements or hyperlinks with a communication sent as a routine e-mail by a business to someone whom the business has an existing relationship does not constitute a violation. CBA is concerned that "the bill goes beyond 'spam' and effects normal electronic communications between a business and its customers." AIA states:

We don't object to these penalties applying to solicited e-mails for either of the first two prohibited acts - use of a false domain name or falsification of a header. We do object, however, to applying the penalties to the third act - use of a subject line likely to "mislead" the recipient regarding the contents. Applying these penalties to the actions described in the third prohibition could lead to litigation regarding routine e-mail communications between businesses and their existing customers.

LIKELY AUTHOR'S AMENDMENTS TO ADDRESS BANKERS' CONCERNS : The author's _ office has informed Committee staff that they are in

SB 1457
Page 5

communication with the California Bankers Association to try to further refine the bill to permit legitimate businesses that offer advertisements in their emails not to fall within the measure's penalty provisions. The author states it is not his intent to penalize legitimate business for email advertisements that are within their normal course of correspondence. The author's office further states that this bill is intended to deal with "truly falsified, misleading and deceptive spammers, not legitimate business communications with customers."

REGISTERED SUPPORT / OPPOSITION :

Support

None on file

Opposition

American Insurance Association
California Bankers Association (oppose unless amended)

—

Analysis Prepared by : Drew Liebert / JUD. / (916) 319-2334

EXHIBIT L

AMENDED IN ASSEMBLY AUGUST 5, 2004

AMENDED IN ASSEMBLY JUNE 17, 2004

AMENDED IN ASSEMBLY JUNE 9, 2004

SENATE BILL

No. 1457

Introduced by Senator Murray

February 19, 2004

An act to amend Section 17529.5 of the Business and Professions Code, relating to business.

LEGISLATIVE COUNSEL'S DIGEST

SB 1457, as amended, Murray. Commercial e-mail advertisements.

Existing state law prohibits a person or entity from ~~collecting e-mail addresses or registering multiple e-mail addresses for purposes of the initiation or advertisement in an unsolicited commercial e-mail advertisement sent from California or to a California e-mail address.~~ Existing state law also prohibits a person or entity from advertising in a commercial e-mail advertisement that is sent either from California or to a California e-mail address if the e-mail contains or is accompanied by a 3rd-party's domain name without permission ~~or with~~, *contains or is accompanied by* falsified, misrepresented, obscured, or forged header information, or ~~if the e-mail has a misleading subject line.~~ Existing state law authorizes the recipient of an unsolicited commercial e-mail advertisement transmitted in violation of these prohibitions, ~~the~~ *an* e-mail service provider, or the Attorney General to bring an action to recover actual damages *for a violation of this prohibition*, and authorizes a court to award reasonable attorney's fees and costs ~~to if they~~

SB 1457

— 2 —

are a prevailing plaintiff. ~~A violation of the provisions governing advertising is a misdemeanor.~~

This bill would delete the prohibition against obscured header information. The bill would authorize *the Attorney General, an e-mail service provider, or the recipient of an unsolicited commercial e-mail advertisement* transmitted in violation of these provisions; ~~the e-mail service provider, or the Attorney General~~ to bring an action to recover ~~actual damages and~~ liquidated damages of \$1,000 per *unsolicited commercial e-mail advertisement* transmitted in violation of the provisions, up to \$1,000,000 per incident, subject to reduction by the court, ~~and would authorize the award of reasonable attorney's fees and costs to a prevailing plaintiff.~~ The bill would prohibit an action from ~~being brought under both this damages provision and other existing~~ *the bringing of multiple actions under different* damages provisions relating to e-mail advertisements for the same ~~e-mail transmission violation.~~

~~Because a violation of the bill would be a crime, it would impose a state-mandated local program.~~

~~The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.~~

~~This bill would provide that no reimbursement is required by this act for a specified reason.~~

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: *yes no*.

The people of the State of California do enact as follows:

1 SECTION 1. Section 17529.5 of the Business and Professions
2 Code is amended to read:

3 17529.5. (a) It is unlawful for any person or entity to ~~initiate~~
4 ~~or~~ advertise in a commercial e-mail advertisement either sent from
5 California or sent to a California electronic mail address under any
6 of the following circumstances:

7 (1) The e-mail advertisement contains or is accompanied by a
8 third-party's domain name without the permission of the third
9 party.

10 (2) The e-mail advertisement contains or is accompanied by
11 falsified, misrepresented, or forged header information. This

subdivision paragraph does not apply to truthful information used by a third party who has been lawfully authorized by the advertiser to use that information.

(3) The e-mail advertisement has a subject line that a person knows would be likely to mislead a recipient, acting reasonably under the circumstances, about a material fact regarding the contents or subject matter of the message.

~~(b) (1) (A) A recipient of an e-mail advertisement transmitted in violation of this section, an electronic mail service provider, or the Attorney General may bring an action against an entity that violates any provision of this section to recover either or both of~~

~~(b) (1) (A) In addition to any other remedies provided by any other provision of law, the following may bring an action against a person or entity that violates any provision of this section:~~

~~(i) The Attorney General.~~

~~(ii) An electronic mail service provider.~~

~~(iii) A recipient of an unsolicited commercial e-mail advertisement, as defined in Section 17529.1.~~

~~(B) A person or entity bringing an action pursuant to subparagraph (A) may recover either or both of the following:~~

~~(i) Actual damages.~~

~~(ii) Liquidated damages of one thousand dollars (\$1,000) for each unsolicited commercial e-mail advertisement transmitted in violation of this section, up to one million dollars (\$1,000,000) per incident.~~

~~(B)~~

(C) The recipient, an electronic mail service provider, or the Attorney General, if the prevailing plaintiff, may also recover reasonable attorney's fees and costs.

~~(C)~~

(D) However, there shall not be a cause of action under this section against an electronic mail service provider that is only involved in the routine transmission of the e-mail advertisement over its computer network.

(2) If the court finds that the defendant established and implemented, with due care, practices and procedures reasonably designed to effectively prevent *unsolicited commercial* e-mail advertisements that are in violation of this section, the court shall reduce the liquidated damages recoverable under paragraph (1) to a maximum of one hundred dollars (\$100) for each *unsolicited*

SB 1457

— 4 —

1 *commercial* e-mail advertisement, or a maximum of one hundred
2 thousand dollars (\$100,000) per incident.

3 (3) (A) A person who has brought an action against a party ~~for~~
4 ~~a violation of~~ *under* this section shall not bring an action against
5 that party under Section 17529.8 or 17538.45 for the same
6 commercial e-mail advertisement, as defined in subdivision (c) of
7 Section 17529.1.

8 (B) A person who has brought an action against a party ~~for a~~
9 ~~violation of~~ *under* Section 17529.8 or 17538.45 shall not bring an
10 action against that party under this section for the same
11 commercial e-mail advertisement, as defined in subdivision (c) of
12 Section 17529.1.

13 SEC. 2. No reimbursement is required by this act pursuant to
14 Section 6 of Article XIII B of the California Constitution because
15 the only costs that may be incurred by a local agency or school
16 district will be incurred because this act creates a new crime or
17 infraction, eliminates a crime or infraction, or changes the penalty
18 for a crime or infraction, within the meaning of Section 17556 of
19 the Government Code, or changes the definition of a crime within
20 the meaning of Section 6 of Article XIII B of the California
21 Constitution.



EXHIBIT M

Senate Bill No. 1457

CHAPTER 571

An act to amend Section 17529.5 of the Business and Professions Code, relating to business.

[Approved by Governor September 17, 2004. Filed
with Secretary of State September 17, 2004.]

LEGISLATIVE COUNSEL'S DIGEST

SB 1457, Murray. Commercial e-mail advertisements.

Existing state law prohibits a person or entity from advertising in a commercial e-mail advertisement that is sent either from California or to a California e-mail address if the e-mail contains or is accompanied by a 3rd-party's domain name without permission, contains or is accompanied by falsified, misrepresented, obscured, or forged header information, or has a misleading subject line. Existing state law authorizes the recipient of an unsolicited commercial e-mail advertisement transmitted in violation of these prohibitions, an e-mail service provider, or the Attorney General to bring an action to recover actual damages for a violation of this prohibition, and authorizes a court to award reasonable attorney's fees and costs if they are a prevailing plaintiff.

This bill would delete the prohibition against obscured header information. The bill would authorize the Attorney General, an e-mail service provider, or the recipient of an unsolicited commercial e-mail advertisement transmitted in violation of these provisions to bring an action to recover liquidated damages of \$1,000 per unsolicited commercial e-mail advertisement transmitted in violation of the provisions, up to \$1,000,000 per incident, subject to reduction by the court. The bill would prohibit the bringing of multiple actions under different damages provisions relating to e-mail advertisements for the same violation.

The people of the State of California do enact as follows:

SECTION 1. Section 17529.5 of the Business and Professions Code is amended to read:

17529.5. (a) It is unlawful for any person or entity to advertise in a commercial e-mail advertisement either sent from California or sent to a California electronic mail address under any of the following circumstances:

(1) The e-mail advertisement contains or is accompanied by a third-party's domain name without the permission of the third party.

(2) The e-mail advertisement contains or is accompanied by falsified, misrepresented, or forged header information. This paragraph does not apply to truthful information used by a third party who has been lawfully authorized by the advertiser to use that information.

(3) The e-mail advertisement has a subject line that a person knows would be likely to mislead a recipient, acting reasonably under the circumstances, about a material fact regarding the contents or subject matter of the message.

(b) (1) (A) In addition to any other remedies provided by any other provision of law, the following may bring an action against a person or entity that violates any provision of this section:

(i) The Attorney General.

(ii) An electronic mail service provider.

(iii) A recipient of an unsolicited commercial e-mail advertisement, as defined in Section 17529.1.

(B) A person or entity bringing an action pursuant to subparagraph (A) may recover either or both of the following:

(i) Actual damages.

(ii) Liquidated damages of one thousand dollars (\$1,000) for each unsolicited commercial e-mail advertisement transmitted in violation of this section, up to one million dollars (\$1,000,000) per incident.

(C) The recipient, an electronic mail service provider, or the Attorney General, if the prevailing plaintiff, may also recover reasonable attorney's fees and costs.

(D) However, there shall not be a cause of action under this section against an electronic mail service provider that is only involved in the routine transmission of the e-mail advertisement over its computer network.

(2) If the court finds that the defendant established and implemented, with due care, practices and procedures reasonably designed to effectively prevent unsolicited commercial e-mail advertisements that are in violation of this section, the court shall reduce the liquidated damages recoverable under paragraph (1) to a maximum of one hundred dollars (\$100) for each unsolicited commercial e-mail advertisement, or a maximum of one hundred thousand dollars (\$100,000) per incident.

(3) (A) A person who has brought an action against a party under this section shall not bring an action against that party under Section 17529.8 or 17538.45 for the same commercial e-mail advertisement, as defined in subdivision (c) of Section 17529.1.

(B) A person who has brought an action against a party under Section 17529.8 or 17538.45 shall not bring an action against that party under

this section for the same commercial e-mail advertisement, as defined in subdivision (c) of Section 17529.1.

SEC. 2. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.



EXHIBIT N

SENATE RULES COMMITTEE	SB 186
Office of Senate Floor Analyses	
1020 N Street, Suite 524	
(916) 445-6614	Fax: (916)
327-4478	

—

UNFINISHED BUSINESS

Bill No: SB 186
Author: Murray (D), et al
Amended: 9/5/03
Vote: 21

SENATE BUSINESS & PROFESSIONS COMMITTEE : 6-0, 4/28/03
AYES: Figueroa, Aanestad, Brulte, Cedillo, Machado, Murray
NOTE RECORDED: Vincent

SENATE APPROPRIATIONS COMMITTEE : Senate Rule 28.8

SENATE FLOOR : 24-12, 6/2/03
AYES: Aanestad, Alarcon, Alpert, Brulte, Burton, Cedillo,
Chesbro, Ducheny, Dunn, Figueroa, Florez, Karnette,
Kuehl, Machado, Murray, Ortiz, Perata, Romero, Scott,
Sher, Soto, Speier, Torlakson, Vincent
NOES: Ackerman, Ashburn, Denham, Hollingsworth, Johnson,
Knight, Margett, McClintock, McPherson, Morrow, Oller,
Poochigian
NO VOTE RECORDED: Battin, Bowen, Escutia, Vasconcellos

ASSEMBLY FLOOR : 71-7, 9/8/03 - See last page for vote

SUBJECT : Electronic mail advertising

SOURCE : Author

DIGEST : This bill clarifies current law and creates
avenues to sue advertisers for unsolicited e-mail (spam).
The bill creates a cause of action for the consumer, the
e-mail service provider, or the Attorney general, to sue

CONTINUED

SB 186
Page

2

for violations of this bill's restrictions and

prohibitions.

Assembly Amendments make various changes, including: _

-
1. Including provisions that prohibit a person or entity from collecting or registering e-mail addresses for the purpose of advertising in an unsolicited commercial e-mail advertisement from California or to a California e-mail address.
 2. Including a provision that prohibits a person or entity from using a commercial e-mail advertisement containing certain falsified, misrepresented, obscured, or misleading information.
 3. Revising provisions relating to the recovery of damages.
 4. Prohibiting an e-mail service provider from bringing an action under both this provision and other provisions being added by the bill for the same unsolicited e-mail advertisements.

ANALYSIS :

This bill:

1. Authorizes a recipient, an e-mail service provider, or the Attorney General to bring an action to recover actual damages, and/or liquidated damages of \$1,000 per unsolicited commercial e-mail, up to \$1 million per incident, as defined. Provides for an award of reasonable attorney's fees and costs to a prevailing plaintiff.
2. Provides that if the court finds that the defendant establishes and implemented with due care, practices and procedures reasonably designed to effectively prevent unsolicited commercial e-mail advertisements, the court shall reduce the liquidated damages to a maximum of \$100 for each unsolicited, or a maximum of \$100,000 per incident.
3. Establishments that commercial e-mail ads sent pursuant

SB 186

Page

3

to the exemption provided for a "preexisting or current business relationship" shall provide the recipient with the ability to "opt-out" from receiving further commercial e-mail ads by calling a toll-free telephone number or by sending an "unsubscribe" e-mail to the advertiser offering the products or services in the commercial e-mail ad. This "opt-out" provision does not apply to recipients who are receiving free e-mail service with regard to commercial e-mail ads sent by the provider of the e-mail service.

4. Defines "preexisting or current business relationship," as used in connection with the sending of a commercial e-mail ad, to mean that the recipient has made an inquiry, and has provides his or her e-mail address, or has made an application, purchase, or transaction, with or without consideration, regarding products or services offered by the advertiser.
5. Establishes that it is unlawful for any person or entity to advertise using a commercial e-mail ad either sent form California or sent to a California e-mail address under any of the following circumstances:
 - A. The commercial e-mail ad contains or is accompanied by a third party's domain name without the permission of the third party
 - B. The commercial e-mail ad contains or is accompanied by falsified, misrepresented, obscured, or forged header information.
 - C. The commercial e-mail ad has a subject line that a person knows will likely mislead a recipient, acting reasonably under the circumstances, about a material fact regarding the contents or subject matter of the message.
6. Prohibits any person or entity from collecting e-mail addresses on the Internet for the purpose of using the addresses to initiate or advertise in unsolicited commercial e-mail.
7. Prohibits any person or entity from using an e-mail

SB 186
Page

4

address obtained by automated means based on a combination of names, letters, or numbers, in order to initiate or advertise in unsolicited commercial e-mail.

8. Prohibits any person from using scripts or other automated means to register for multiple e-mail accounts in order to initiate or advertise in unsolicited commercial e-mail.
9. Provides that the provisions of this bill shall not be construed to limit or restrict the adoption, implementation, or enforcement by a provider of Internet access service of a policy of declining to transmit, receive, route, relay, handle, or store certain types of electronic messages.
10. Provides that if an electronic mail service provider brings an action against a party for violation of the provider's policy prohibiting or restricting the use of its equipment related to unsolicited commercial e-mails (pursuant to Business and Professions Code Section

17538.45), that electronic mail service provider may not bring an additional action under the penalty provisions created by this bill (pursuant to Business and Professions Code Section 17529.8) for the same violation. Conversely, if an action is brought under the penalty provisions of this bill, an additional action may not be brought under Business and Professions Code Section 17538.45 for the same violation.

Rationale . This bill addresses the proliferation of e-mail spam by clarifying current law and creating avenues to sue advertisers for unsolicited mail.

Background . Spam has received increased attention from both the state and federal governments because of the dramatic increase and associated loss of productivity in recent years.

According to a national technology research firm, spam will cost American businesses over 10 billion in 2003. Spam impacts individuals, businesses and government due to the time and effort required to filter out unsolicited e-mail and work interruptions required to process unwanted e-mail.

SB 186
Page

5

Current law regulates misleading advertising and subjects violators to both civil and criminal penalties and prohibits unsolicited e-mail unless it contains either a toll free number or a return e-mail address which the recipient can use to notify the sender to stop sending spam.

Related Legislation

SB 12 (Bowen), 2003-04 Session . Also addressed the proliferation of e-mail spam. The provisions of this SB 12 were broader than this bill. (Died in Senate Business and Professions Committee)

AB 567 (Simitian), 2003-04 Session . Authorized recipient of unsolicited e-mail advertisements to bring an action for recovery of actual damages or \$1,000, whichever is greater, for each violation. The bill was never set for hearing in the Senate Business and Professions Committee.

AB 1676 (Bowen), Chapter 865, Statutes of 1998 . Requires unsolicited commercial e-mail to contain an "ADV" or "ADV:ADLT" label in the subject line of the message.

FISCAL EFFECT : Appropriation: No Fiscal Com.: Yes
Local: Yes

According to the Assembly Appropriations Committee, minor, absorbable workload to the State Department of Justice, as enforcement authority is discretionary.

SUPPORT : (Verified 9/5/03)

Consumer Union
County of Los Angeles
Privacy Rights Clearinghouse
Microsoft
Mountain View Chamber of Commerce
Atlas Broadband
Spot Inter Works
California Prosecutors Association
CalWeb Internet Services
Computer Stuff

SB 186
Page

6

Leading Edge
Apple One
Consumer Action

ASSEMBLY FLOOR :

AYES: Aghazarian, Bates, Benoit, Berg, Bermudez, Bogh,
Calderon, Canciamilla, Chan, Chavez, Chu, Cohn, Corbett,
Correa, Cox, Daucher, Diaz, Dutra, Dutton, Dymally,
Frommer, Garcia, Goldberg, Hancock, Harman, Jerome
Horton, Shirley Horton, Houston, Jackson, Keene, Kehoe,
Koretz, Laird, Leno, Leslie, Levine, Lieber, Liu,
Longville, Lowenthal, Maddox, Maldonado, Matthews, Maze,
McCarthy, Montanez, Mullin, Nakanishi, Nakano, Nation,
Negrete McLeod, Nunez, Oropeza, Pacheco, Parra, Pavley,
Plescia, Reyes, Richman, Ridley-Thomas, Salinas,
Simitian, Spitzer, Steinberg, Strickland, Vargas,
Wiggins, Wolk, Wyland, Yee, Wesson
NOES: Campbell, Cogdill, Haynes, La Malfa, La Suer,
Mountjoy, Samuelian

CP:cm 9/9/03 Senate Floor Analyses

SUPPORT/OPPOSITION: SEE ABOVE

**** END ****

EXHIBIT O

SB 186
Page 1

SENATE THIRD READING
SB 186 (Murray)
As Amended September 5, 2003
Majority vote

SENATE VOTE :Vote not relevant _

JUDICIARY	11-1	BUSINESS AND
PROFESSIONS	13-0	

Ayes: Corbett, Harman, Dutra, Hancock, Jackson, Lieber, Longville, Montanez, Spitzer, Steinberg, Berg	Ayes: Correa, Shirley Horton, Aghazarian, Bermudez, Corbett, Koretz, Leno, Maldonado, Maze, Nation, Vargas, Wyland, Yee
Nays: Pacheco	

APPROPRIATIONS 18-3

Ayes: Steinberg, Bates, Berg, Calderon, Corbett, Correa, Diaz, Goldberg, Leno, Maldonado, Nation, Negrete McLeod, Nunez, Pavley, Ridley-Thomas, Simitian, Wiggins, Yee	
Nays: Haynes, Pacheco, Samuelian	

SUMMARY : Modifies current law that allows the recipient of unsolicited electronic mail (e-mail) advertisements (ads) to contact the sender to remove his or her e-mail address from the sender's mailing list, and prohibits the sending of unsolicited e-mail ads from California or to a California e-mail address. Specifically, this bill :

1) Authorizes a recipient, an e-mail service provider, or the

SB 186
Page 2

Attorney General (AG) to bring an action to recover actual

damages, and/or liquidated damages of \$1,000 per unsolicited commercial e-mail, up to \$1 million per incident, as defined. Provides for an award of reasonable attorney's fees and costs to a prevailing plaintiff.

- 2) Provides that if the court finds that the defendant establishes and implemented with due care, practices and procedures reasonably designed to effectively prevent unsolicited commercial e-mail advertisements, the court shall reduce the liquidated damages to a maximum of \$100 for each unsolicited, or a maximum of \$100,000 per incident.
- 3) Establishes that commercial e-mail ads sent pursuant to the exemption provided for a "preexisting or current business relationship" shall provide the recipient with the ability to "opt-out" from receiving further commercial e-mail ads by calling a toll-free telephone number or by sending an "unsubscribe" e-mail to the sender of the commercial e-mail ad. This "opt-out" provision does not apply to recipients who are receiving free e-mail service with regard to commercial e-mail ads sent by the provider of the e-mail service.
- 4) Defines "preexisting or current business relationship," as used in connection with the sending of a commercial e-mail ad, to mean that the recipient has made an inquiry, and has provided his or her e-mail address, or has made an application, purchase, or transaction, with or without consideration, regarding products or services offered by the sender.
- 5) Establishes that it is unlawful for any person or entity to advertise using a commercial e-mail ad either sent from California or sent to a California e-mail address under any of the following circumstances:
 - a) The commercial e-mail ad contains or is accompanied by a third party's domain name without the permission of the third party;
 - b) The commercial e-mail ad contains or is accompanied by falsified, misrepresented, obscured, or forged header information; and,
 - c) The commercial e-mail ad has a subject line that a

SB 186

Page 3

person knows would likely mislead a recipient, acting reasonably under the circumstances, about a material fact regarding the contents or subject matter of the message.

- 6) Prohibits any person or entity from collecting e-mail addresses on the Internet for the purpose of using the addresses to initiate or send unsolicited commercial e-mail.
- 7) Prohibits any person or entity from using an e-mail address obtained by automated means based on a combination of names,

letters, or numbers, in order to initiate or send unsolicited commercial e-mail.

- 8) Prohibits any person from using scripts or other automated means to register for multiple e-mail accounts in order to initiate or send unsolicited commercial e-mail.
- 9) Provides that the provisions of this bill shall not be construed to limit or restrict the adoption, implementation, or enforcement by a provider of Internet access service of a policy of declining to transmit, receive, route, relay, handle, or store certain types of electronic messages.
- 10) Provides that if an electronic mail service provider brings an action against a party for violation of the provider's policy prohibiting or restricting the use of its equipment related to unsolicited commercial e-mails (pursuant to Business and Professions Code Section 17538.45), that electronic mail service provider may not bring an additional action under the penalty provisions created by this bill (pursuant to Business and Professions Code Section 17529.8) for the same violation. Conversely, if an action is brought under the penalty provisions of this bill, an additional action may not be brought under Business and Professions Code Section 17538.45 for the same violation.
- 11) Contains legislative intent language delineating the adverse consequences of e-mail spam.
- 12) Defines "e-mail service provider" to mean any person, including an Internet service provider, that is an intermediary in sending or receiving e-mail or that provides to end users of the electronic mail service the ability to send or receive e-mail.

SB 186
Page 4

- 13) Defines "initiate" to mean to transmit or cause to be transmitted a commercial e-mail ad, or assist in the transmission of a commercial e-mail ad by providing electronic mail addresses to which the ad may be sent, but does not include the routine transmission of the ad through the network or system of a telecommunications utility or an e-mail service provider through its network or system.
- 14) Defines "routine transmission" to mean the transmission, routing, relaying, handling, or storing of an electronic mail message through an automatic technical process.
- 15) Defines "incident" as a single transmission or delivery to a single recipient or to a multiple recipient of unsolicited commercial e-mail containing substantial similar content.
- 16) Defines "unsolicited commercial e-mail ad" as a commercial e-mail ad sent to a recipient who has not provided direct consent to receive the commercial e-mail ad and who does not

have a preexisting or current business relationship with the advertiser promoting the lease, sale, rental, gift offer, or other disposition of any property, goods, services, or extension of credit.

17) Defines "direct consent" to mean that the recipient has expressly consented to receive e-mail ads from the advertiser either in response to a clear and conspicuous request for the consent or at the recipient's own initiative.

18) Defines "commercial e-mail ads" as any e-mail message initiated for the purpose of advertising or promoting the lease, sale, rental, gift offer, or other disposition of any property, goods, services, or extension of credit.

19) Provides that the provisions of this bill are "severable" so that if any provision is held invalid, that invalidity shall not affect any other provision that can be given effect.

EXISTING LAW :

1) Prohibits unsolicited advertising by e-mail unless that e-mail contains either a toll free phone number or return e-mail address that the recipient can use to notify the sender not to electronically send any further unsolicited ads.

SB 186
Page 5

2) Prohibits sending unsolicited e-mail ads to any recipient who has notified the sender to stop sending unsolicited e-mails.

3) Requires unsolicited e-mail ads to contain a heading of "ADV:" or "ADV:ADLT," as specified.

4) Prohibits the unauthorized use of e-mail networks to send unsolicited e-mail ads.

5) Authorizes any e-mail service provider whose policy on unsolicited e-mail ads is violated to bring a civil action to recover the actual monetary loss suffered by that provider by reason of that violation, or liquidated damages of \$50 for each e-mail message initiated or delivered, up to a maximum of \$25,000 per day, whichever amount is greater.

6) Makes it a crime to knowingly and without permission use the Internet domain name, as defined, of another individual, corporation, or entity in connection with the sending of one or more e-mail messages, and thereby damage or cause damage to a computer, computer system, or computer network.

FISCAL EFFECT : Minor absorbable workload to the Department of Justice, as enforcement authority is discretionary.

COMMENTS : According to the author, this bill is intended to address a problem well known to all e-mail users, the proliferation of unsolicited e-mail ads, or spam. The author

states that this bill will create a cause of action for the consumer, the e-mail service provider, or the AG, to sue for violations of this bill's restrictions and prohibitions. This bill permits the plaintiff to seek actual damages, and/or liquidated damages of \$1,000 per ad, up to \$1 million per incident, defined as a single transmission of substantially similar content. Where a defendant could show that it implemented practices designed to effectively prevent unsolicited commercial e-mail advertisements, the liquidated damages available would be a maximum of \$100 per advertisement or a maximum of \$100,000 per incident. _

AB 1676 (Bowen), Chapter 865, Statutes of 1998, requires unsolicited commercial e-mail to contain an "ADV:" or "ADV:ADLT" label in the subject line of the message. AB 1676 also requires the message to contain either a valid return e-mail address or a toll-free phone number recipients could use to remove themselves

SB 186
Page 6

from a spam mailing list.

AB 1629 (Miller), Chapter 863, Statutes of 1998, sought to protect Internet Service Providers from spam by allowing e-mail service providers to sue spammers for damages caused to e-mail networks and prohibiting unauthorized domain name use. AB 1629 requires ISPs to provide "actual notice" to the spammer of the ISP's policy on unsolicited commercial e-mail and of the fact that sending the spam would use (or cause to be used) the ISP's equipment located in California.

AB 1769 (Leslie), Chapter 699, Statutes of 2002, subject to certain exceptions, prohibits a person or entity conducting business in California from transmitting a text message ad to a cellular telephone or pager equipped with short message capability or any similar capability allowing the transmission of text messages.

SB 771 (Figueroa), Chapter 695, Statutes of 2001, establishes a "do not call" list for residential and wireless telephone subscribers who do not want to receive telephone solicitations, and prohibits telephone solicitors from calling subscribers who are currently on the "do not call" list. _

Analysis Prepared by : Alejandro Esparza / B. & P. / (916)
319-3301

FN: 0003638

EXHIBIT P

SENATE RULES COMMITTEE	SB 186
Office of Senate Floor Analyses	
1020 N Street, Suite 524	
(916) 445-6614	Fax: (916)
327-4478	

THIRD READING

Bill No: SB 186
Author: Murray (D)
Amended: 5/22/03
Vote: 21

SENATE BUSINESS & PROFESSIONS COMMITTEE : 6-0, 4/28/03
AYES: Figueroa, Aanestad, Brulte, Cedillo, Machado, Murray

SENATE APPROPRIATIONS COMMITTEE : Senate Rule 28.8

SUBJECT : Electronic mail advertising

SOURCE : Author

DIGEST : This bill modifies the existing state law that authorizes unsolicited electronic mail (e-mail) advertisements (ads) provided the recipient can contact the sender to remove his/her address from the sender's mailing list and, instead, prohibits advertisers from using unsolicited commercial e-mail ads.

Senate Floor Amendments of 5/22/03 revise the bill's definition of "direct consent" and "preexisting or current business relationship," and make other technical changes.

ANALYSIS :

This bill:

1. Defines advertiser as a person or entity that advertises through the use of unsolicited commercial e-mail ads.

CONTINUED

SB 186
Page

2. Defines California e-mail address as any of the following:
- A. An e-mail address furnished by an e-mail service provider that sends bills for furnishing and maintaining that e-mail address to a mailing address in this state.
 - B. An e-mail address ordinarily accessed from a computer located in this state.
 - C. An e-mail address furnished to a resident of this state.
3. Defines commercial e-mail ad as any e-mail message initiated for the purpose of advertising or promoting the lease, sale, rental, gift offer, or other disposition of any property, goods, services, or extension of credit.
4. Defines direct consent as that the recipient has expressly consented to receive the message, either in response to a clear and conspicuous request for the consent or at the recipient's own initiative.
5. Defines preexisting or current business relationship as either of the following:
- A. That within the three-year period ending upon receipt of the advertisement, the recipient has made an inquiry application, purchase, or transaction regarding products or services offered by the sender.
 - B. That the recipient has made an inquiry, application, purchase, or transaction regarding products or services offered by the sender and the sender maintains an electronic or written record of the transaction.
6. Defines unsolicited e-mail ad as a commercial e-mail ad sent to a recipient who meets both of the following criteria:
- A. Has not provided direct consent to receive the commercial e-mail ad.
 - B. Does not have a preexisting or current business relationship with the advertiser of the realty, goods, services, or extension of credit.
7. Provides that if an advertiser is located in California, the advertiser shall not advertise using an unsolicited commercial e-mail ad.

- 8.Provides that an advertiser that is not located in California shall not advertise using an unsolicited commercial e-mail ad that is sent to a California e-mail address if the advertiser knows or should reasonably foresee that the e-mail address is a California e-mail address.
- 9.Provides that a recipient of an unsolicited commercial e-mail ad transmitted illegally may bring an action to recover \$1,000 for each individual violation.
- 10.Provides that the Attorney General may bring an action against an advertiser that uses an unsolicited commercial e-mail ad to recover \$1,000 for each individual violation.
- 11.Provides that the laws that authorize unsolicited e-mail ads provided the recipient can contact the sender to remove his/her address from the sender's mailing list do not apply to advertisers.
- 12.Provides that a cause of action that is in existence before the effective date of this act shall not be affected by this act, but shall instead be governed by the law that was in effect at the time the cause of action arose.

Comments

According to information provided by the author's office, the real problem (with unsolicited e-mail ads) lies with the actual businesses whose products are advertised through

SB 186

Page

4

these e-mails. Those companies are just as much responsible if not more for these e-mails and need be to be held accountable. They are profiting at the expense of the consumer.

Similar Legislation

SB 12 (Bowen), 2003-04 Session . Modifies the existing state law that authorizes unsolicited e-mail ads provided the recipient can contact the sender to remove his/her address from the sender's mailing list and, instead, broadly prohibits the sending of unsolicited e-mail ads from California or to a California e-mail address.

Related Legislation

SB 342 (Florez) - 2003-04 Session . Provides that persons conducting business in California are prohibited from sending unsolicited e-mail ads unless the ad contains a statement that includes the sender's identity, postal address, and e-mail address or telephone number. This bill

also allows the recipient of an unsolicited e-mailed ad to notify the sender of the ad not to e-mail any further unsolicited advertising material to the e-mail address or addresses specified by the recipient.

AB 567 (Simitian) - 2003-04 Session . Specifically authorizes ISP recipients of prohibited ads to bring an action for the recovery of actual damages or one thousand dollars (\$1,000), whichever is greater, for each violation.

FISCAL EFFECT : Appropriation: No Fiscal Com.: Yes
Local: Yes

CP:cm 5/23/03 Senate Floor Analyses

SUPPORT/OPPOSITION: NONE RECEIVED

**** END ****